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In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, PETITIONER

v.

HARRISON P. CRONIC

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED

Whether the court of appeals correctly reversed respondent's convictions on the ground that he did not receive effective assistance of counsel at trial, without identifying any act or omission by counsel that departed substantially from what a reasonably competent criminal defense attorney would have done under the circumstances and without finding any prejudice to respondent.

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HARRISON P. CRONIC

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-7a) is reported at 675 F.2d 1126.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 8a) was entered on April 19, 1982, and a petition for rehearing was denied on July 16, 1982 (App. C, *infra*, 9a). On September 9, 1982, Justice White extended the time within which to file a petition for a writ of certiorari to and including October 14, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right * * * to have the assistance of counsel for his defence.

STATEMENT

1. On February 5, 1980, respondent and co-defendants Wylie Merritt and Carolyn Cummings were indicted in the United States District Court for the Western District of Oklahoma on 13 counts of mail fraud and unlawful use of a fictitious name, in violation of 18 U.S.C. 1341 and 1342. The indictment charged that respondent and the co-defendants were involved in a check-kiting scheme between banks in Tampa, Florida and Norman, Oklahoma. The checks were drawn on the accounts of Skyproof Manufacturing, Inc., a Florida corporation that was held out as a manufacturer of roof trusses for mobile homes (App. A, *infra*, 1a–2a).

Respondent and Cummings initially were represented by a single attorney, Arnold D. Levine of Tampa, Florida. Prior to trial, however, Levine moved to withdraw as counsel on the ground that the interests of Cummings and respondent were in conflict. Respondent filed an opposition to the motion to withdraw. After the motion was filed, the court appointed another attorney, Chris Colston, to represent respondent, subject to the possibility of relieving Colston if the court declined to grant Levine's motion to withdraw (6/19/80 Tr. 2, 5-6).[1]

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[1] "6/19/80 Tr." refers to the transcript of the hearing on the motion to withdraw. "Tr." refers to the transcript of the trial proceedings held July 14 through 17, 1980.

At a hearing on the motion to withdraw, held on June 19, 1980, respondent attempted to establish that Levine actually sought to withdraw because of a dispute over fees (6/19/80 Tr. 6-12). After the hearing had progressed for a short period, the court concluded that there was indeed a conflict of interest and hostility between respondent and Levine and Cummings, and it therefore granted Levine's motion to withdraw (*id.* at 12-14).

The trial previously had been scheduled for June 30, 1980, some 11 days later (6/19/80 Tr. 14-15). Respondent informed the court at the hearing of his view that he could not receive a fair defense if Colston were given only "one or two weeks to prepare" for trial (*id.* at 15). Levine told the court that Colston would need 30 days to prepare (*id.* at 18). Colston then requested a minimum of 30 days to prepare (*id.* at 19). The court granted a continuance, but decided to cut the continuance "a few days short" of the 30 days requested by Colston in order to have the trial commence on Monday, July 14, 1980, the first day of the court's July docket (*ibid.*). Neither petitioner nor Colston apparently thereafter raised any further objection to the July 14 trial date, and the Assistant United States Attorney expressed the view that this would afford counsel "enough time" (*ibid.*).

Colston stated at the hearing that the United States Attorney's Office had granted him access to the files in the postal inspector's office the previous day (6/19/80 Tr. 19), and the Assistant United States Attorney reiterated at the hearing that the responsible postal inspection official was prepared to meet with Colston at the latter's convenience for discovery purposes (*id.* at 20). At the close of the hearing, respondent informed the court that he had spoken with Colston and that Colston had "been most helpful" (*id.* at 23), but that he wanted to point out that Colston's specialty was real estate law

and that he had been involved in only one federal criminal case in the past (*ibid.*). The court stated that if respondent intended to request that he be permitted to select his own lawyer to be appointed by the court, that request was denied. The court explained that Colston was "very bright" and that he had been selected from an alphabetical list of lawyers in the district who were qualified and screened for this purpose (*ibid.*).

2.a. At trial, another attorney, Ryland Rivas, assisted Colston in his representation of respondent (Tr. 2, 302).[2] The government introduced evidence establishing the existence of the check-kiting scheme between accounts of Skyproof in banks in Tampa and Norman, with the checks cleared by the use of the mails through intermediate banks (*id.* at 92-105, 110-113, 114-130, 134-148, 150-151, 152-160, 167-184, 227-256, 261-283, 324-333). As a result of these transactions, the Norman Bank of Commerce suffered a loss of approximately $484,000 (*id.* at 176, 300, 448). The checks were signed by co-defendant Cummings, who was formally the president of Skyproof, but the evidence showed that respondent directed the affairs of Skyproof (*id.* at 169-172, 186, 223-224, 300-301, 304-307, 318, 320, 333, 340). Respondent had not been identified as an officer or owner of the company because of prior difficulties with the Internal Revenue Service and unfavorable publicity about prior business dealings (*id.* at 475). Co-defendants Cummings and Merritt, an accountant residing in Norman who participated in some of the transactions, testified for the government at trial.[3] Merritt's testimony showed that respondent was the true head of Skyproof and had directed its affairs (*id.* at 365, 368,

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[2] As explained below (see page 9, *infra*), the government filed with its petition for rehearing in the court of appeals an affidavit of Rivas averring that he had extensive experience in criminal cases and had assisted Colston at all stages of the proceedings.

[3] Cummings pleaded guilty to three counts of the indictment prior to trial (Tr. 526-527), and the government agreed to dismiss the indictment against Merritt if he testified truthfully at trial (*id.* at 418-419).

370, 373, 382, 389, 392, 394). Cummings' testimony also established that although she was president, respondent directed Skyproof's affairs, conceived of the check-kiting scheme, and generally instructed her to sign checks (*id.* at 479-488, 491-492, 494-496, 505, 508, 510-512).

On cross-examination of the government's witnesses, Colston repeatedly sought to have them confirm that Cummings was president of Skyproof and had signed the checks, thereby attempting to separate respondent from the transactions (See, *e.g.*, Tr. 131, 189-190, 194, 196, 201, 204, 256-260, 285-286, 302, 311, 321-322, 334-335, 428). As the court of appeals stated, "[d]efense counsel's trial strategy may be fairly summarized as putting the government to its proofs, pointing an accusatory finger at one of the allegedly defrauded banks, and arguing that the bank's toleration of overdrafts was an informal extension of credit to a legitimate business" (App. A, *infra*, 2a; see Tr. 87-92, 522-526, 529-536, 581-590).

b. At the close of the government's case, the defense made a motion to dismiss the indictment on the ground that the government had failed to establish any case against respondent. The district court denied the motion, concluding that the evidence presented a question for the jury (Tr. 567). The court had previously granted respondent's motion to subpoena seven witnesses, and at least some of these witnesses were present at the time of trial (*id.* at 572). Colston informed the court, however, that the defense would not call any witnesses (*id.* at 567-572). The court then questioned respondent to establish that he understood his rights. But before the court did so, the following colloquy occurred (*id.* at 568):

> THE COURT: * * * This young man, Colston, I think, has done a tremendous job representing you.
>
> [RESPONDENT]: I agree, certainly agree.

> THE COURT: You acted at one time that you weren't happy, but that was earlier when you hadn't seen him in action.
>
> [RESPONDENT]: I am certainly glad you overruled me.
>
> THE COURT: He's a very fine young lawyer and this other young man over there too. * * *

The court then proceeded to explain to respondent that he had the right to testify or not to testify, that if he did testify he would be subject to cross-examination on the basis of a prior conviction in Tampa for giving a false statement to a bank, and that he was entitled to have the jury instructed that no adverse inference should be drawn from his failure to testify (Tr. 568-571). Respondent stated that he would defer to counsel on whether the instruction should be given (*id.* at 568) and agreed that it should be. After discussing the possible use of the prior conviction, the court determined that respondent's decision not to take the stand was made intelligently, with knowledge of all the options (*id.* at 571). Immediately thereafter, in open court but out of the presence of the jury, a further exchange occurred regarding the performance of defense counsel (*ibid.*):

> THE COURT: I want to make a record on one thing I forgot, but the second after the Court Reporter left in there, [respondent] expressed his personal appreciation of these lawyers for the good work they have done and he wanted to make it a part of the record.
>
> [RESPONDENT]: I would also like to state the reason I went up to Mr. Colston's office yesterday was so that Mr. Emery, his senior law partner, would know that before I either won or lost.

After Colston expressed his satisfaction with the jury instructions, but before the jury retired to deliberate, the court similarly stated to Colston and co-counsel Rivas (*id.* at 599-600):

> Well, boys, I want to tell you again I appreciate you two, you know, this guy couldn't have got a better representation if he had hired someone in Florida or Oklahoma City or anyplace else and I appreciate it.

After deliberating for 2¼ hours, the jury returned a verdict of guilty on 11 counts and not guilty on two counts (Tr. 601).[4] Respondent was sentenced to 25 years' imprisonment and a fine of $11,000 (App. A, *infra*, 2a).

3. The court of appeals reversed respondent's convictions, concluding that he was denied the effective assistance of counsel at trial (App. A, *infra*, 2a). The court did not find it significant that, as the government contended, there was no showing that respondent's counsel had failed to exercise "'the skill, judgment and diligence of a reasonably competent attorney'"—the standard utilized by the Tenth Circuit for evaluating claims of ineffective assistance of counsel in other contexts (*id.* at 3a, quoting *Dyer* v. *Crisp*, 613 F.2d 275, 278 (en banc), cert. denied, 445 U.S. 945 (1980)). The court explained that under its prior decisions, when circumstances hamper a lawyer's preparation of the case, "the defendant need not show specified errors in the conduct of his defense in order to show ineffective assistance of counsel" (App. A, *infra*, 3a, citing *United States* v. *King*, 664 F.2d 1171, 1172-1173 (10th Cir. 1981), and *United States* v. *Golub*, 638 F.2d 185, 187 (10th Cir. 1980)). The court observed that instead, under *King* and *Golub*, the circumstances to be considered in determining whether inadequacy of representation may be "inferred" without proof of specific prejudice at trial include the following (App. A, *infra*, 4a):

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[4] After the court accepted the verdict, it briefly discussed the procedure regarding sentencing, observing that respondent could address the court personally and that his "very able lawyers" could speak for him as well (Tr. 603).

(1) the time afforded for investigation and preparation; (2) the experience of counsel; (3) the gravity of the charge; (4) the complexity of possible defenses; and (5) the accessibility of witnesses to counsel.

The court applied these factors not by independently assessing the performance of defense counsel in this case, but rather by comparing the circumstances present here with those present in *King*. Thus, the court observed that Colston had 25 days to prepare for trial of a case that the government had developed over a 4½ year period, as compared with 27 days for preparation of a defense to a tax fraud charge that the government developed over a three-year period in *King*. Respondent, the court observed, faced a sentence of up to 65 years imprisonment and actually was sentenced to 25 years, while in *King* the defendant faced a maximum sentence of only five years. The court further noted that *King* did not discuss the accessibility of witnesses, but that here, although no defense witnesses appeared, the government's witnesses came from four states (App. A, *infra*, 4a-5a).

The court did perceive a material distinction between this case and *King* in that the latter was apparently more complex, involving approximately 200 witnesses and 5,000 exhibits, as compared with 19 witnesses and 50 exhibits in this case (App. A, *infra*, 2a, 5a). Nevertheless, the court observed, "[respondent's] case was not an ideal one for an aspiring criminal defense lawyer to cut his teeth on" (*ibid.*), because mail fraud cases tend to be factually and legally complex. In addition, the court reasoned that if this case was indeed simpler than *King*, this advantage was offset by Colston's lack of experience in criminal trials (*ibid.*).

4. The government filed a petition for rehearing (*United States* v. *Cronic*, No. 80-1955 (10th Cir.)) with suggestion for rehearing en banc, noting (Reh. Pet. 1-2) that the claim of ineffective assistance of counsel

had been raised for the first time on appeal and arguing that a remand would be appropriate for an evidentiary hearing on the claim of ineffective assistance of counsel. The government also pointed out (Reh. Pet. at 7-8) that Colston was assisted by another attorney, Ryland Rivas. Rivas averred in an affidavit appended to the petition for rehearing that he had been admitted to practice since 1974 and was a member of the bars of the State of Oklahoma and the federal district court and court of appeals. He further averred that prior to 1980, the date of petitioner's trial, he "had extensive experience in the practice of criminal law and has tried jury cases ranging from escape from the penitentiary to murder in the 1st degree." He stated that he "assisted Mr. Chris Colston in his preparation of defenses for [respondent] and was present during all stages in the proceedings to assist Mr. Colston with the preparation and drafting of motions, examination of witnesses and examination of all evidence available to Mr. Colston." The government's petition for rehearing and suggestion for rehearing en banc were denied (App. C, *infra*, 9a).

REASONS FOR GRANTING THE PETITION

Despite the district court's and respondent's repeated statements at the close of trial that respondent's court-appointed attorneys performed admirably, the court of appeals reversed respondent's convictions on the ground that his Sixth Amendment right to the effective assistance of counsel had been violated at trial. The court did so without pointing to any manner in which counsel's performance was ineffective or identifying any act or omission of counsel that it regarded as error, and without indicating that it found respondent's defense to have been adversely affected by counsel's performance. This result conflicts with decisions of this Court and of other courts of appeals holding that in order for a conviction to be set aside under the Sixth Amendment because of the assertedly ineffective assistance of counsel,

the defendant must show that counsel's performance departed substantially from that which could be expected of a reasonably competent defense attorney and that some prejudice or likelihood of prejudice resulted.

The court of appeals appears to have attached primary significance to the fact that the continuance granted by the trial court allowed counsel only 25 days to prepare for trial. But the court did not find that allowing 25 days rather than the 30 days requested actually hindered counsel's preparation in any way that affected his performance at trial. Reversal of the convictions in these circumstances, without a showing of prejudice from the timing of the appointment of counsel or the length of the continuance granted, is also flatly inconsistent with a number of this Court's decisions and with the decisions of the other courts of appeals.

Moreover, the Tenth Circuit's decision in this case is just one in a series in which that court has adhered to an approach that is in conflict with well-established principles governing ineffective assistance of counsel claims. Review by this Court is required to restore consistency in this important area of the law.

1.a. The decisions of this Court make clear that in order for a conviction to be set aside under the Sixth Amendment on the basis of ineffective assistance of counsel, the defendant must show at a minimum that his attorney's performance in the case was below the range of competence that reasonably may be expected of counsel in criminal cases. *McMann* v. *Richardson*, 397 U.S. 759, 771 (1970); *Tollett* v. *Henderson*, 411 U.S. 258, 266 (1973); see also *Engle* v. *Isaac*, No. 80-1430 (Apr. 5, 1982), slip op. 25; *Cuyler* v. *Sullivan*, 446 U.S. 335, 349 (1980); *Wainwright* v. *Sykes*, 433 U.S. 72, 96 (1977) (Stevens, J., concurring). The defendant must, in other words, show "serious derelictions" on the part of trial counsel. *McMann* v. *Richardson*, *supra*, 397 U.S. at 774. Consistent with this Court's teachings, the decisions of other courts of

appeals likewise have stressed that counsel's performance must have departed significantly from what may be expected of reasonably competent defense counsel.[5]

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[5] See, *e.g.*, *Cooper* v. *Fitzharris*, 586 F.2d 1325, 1330 (9th Cir. 1978) (en banc), cert. denied, 440 U.S. 974 (1979) ("serious dereliction"); *United States* v. *Sanford*, 673 F.2d 1070, 1073 (9th Cir. 1982) (same); *Long* v. *Brewer*, 667 F.2d 742, 745 (8th Cir. 1982) ("serious incompetency"); *Boyd* v. *Estelle*, 661 F.2d 388, 389 (5th Cir. 1981) ("seriously inadequate" performance); *Taylor* v. *Starnes*, 650 F.2d 38, 41 (4th Cir. 1981) ("flagrant" error); *Marzullo* v. *State of Maryland*, 561 F.2d 540, 544 (4th Cir. 1977), cert. denied, 435 U.S. 1011 (1978) (same); *United States* v. *Decoster*, 624 F.2d 196, 208 (D.C. Cir.) (en banc) (plurality opinion), cert. denied, 444 U.S. 944 (1979) ("serious incompetency"); 624 F.2d at 232 (MacKinnon, J., concurring) ("substantial breach" of duty); *id.* at 246 (Robinson, J., concurring) (same); *id.* at 275 (Bazelon, J., dissenting) (same); *United States* v. *Wood*, 628 F.2d 554, 559 (D.C. Cir., 1980) (en banc) (same); *United States* v. *Green*, 680 F.2d 183, 188 (D.C. Cir. 1982) ("serious incompetency").

The Second Circuit continues to state the test for considering claims of ineffective assistance of counsel in terms of whether counsel's performance rendered the trial a "farce and mockery" of justice. See, *e.g.*, *United States* v. *Helgesen*, 669 F.2d 69, 71 (1982); *United States* v. *Wight*, 176 F.2d 376, 379 (1949), cert. denied, 338 U.S. 950 (1950). This language, too, emphasizes that counsel's performance must be shown to have been seriously incompetent.

Other courts of appeals have stated that a defendant is entitled only to the assistance of counsel who is reasonably competent or satisfies mimimum standards of professional competence and that he is not entitled to error-free representation. See, *e.g.*, *Wiley* v. *Sowders*, 647 F.2d 642, 648 (6th Cir.), cert. denied, 454 U.S. 1091 (1981); *Alicea* v. *Gagnon*, 675 F.2d 913, 926 (7th Cir. 1982); *United States* v. *Murzyn*, 631 F.2d 525, 533-534 (7th Cir. 1980), cert. denied, 450 U.S. 923 (1981). Indeed, the Tenth Circuit itself has stated that a defendant ordinarily must show that his lawyer's performance fell below that expected of a reasonably competent defense attorney. *Dyer* v. *Crisp*, *supra*, 613 F.2d at 278. The Tenth Circuit felt free to abandon that requirement here because it framed the issue in terms of counsel's opportunity for trial preparation (App. A, *infra*, 3a).

The court of appeals ignored these principles in the instant case when it concluded (App. A, *infra*, 4a) that it could find that respondent was deprived of the effective assistance of counsel at trial without any inquiry into whether Colston's representation in fact was adequate under the circumstances. The court did not even identify any act or omission of counsel at trial that it regarded as error, much less conclude that Colston's performance was outside the range of competence that reasonably may be expected of defense counsel in criminal cases. The court, for example, did not fault counsel's cross-examination of government witnesses; his choice of a defense strategy to put the government to its proofs and to distance respondent from Cummings' check-writing, but not to call any defense witnesses; or the decision that respondent would not take the stand, in view of his prior conviction. In the absence of proof and findings of such deficiencies, there was no basis whatever for the court below to hold that respondent was denied his right to the effective assistance of counsel.

The court of appeals did observe that Colston's prior experience in criminal cases was limited to involvement in one other trial, and the court rested its finding of ineffective assistance of counsel in part on its view that "[respondent's] case was not an ideal one for an aspiring criminal defense lawyer to cut his teeth on" because mail fraud cases "tend" to be legally and factually complex (App. A, *infra*, 5a).[6] The question before the court

[6] Although the court observed that mail fraud cases "tend" to be factually and legally complex, it did not make any effort to assess the actual complexity of this particular case or Colston's grasp of it. The court simply noted in its recitation of the facts that the government's case involved the testimony of Cummings, Merritt, and 17 other witnesses, as well as 50 exhibits (App. A, *infra*, 2a), and indeed acknowledged that this case was apparently less complex than *King*, where there were 200 witnesses and 5,000 exhibits (*id.* at 5a).

of appeals, however, was not whether this was an "ideal" case for Colston to handle, but rather whether respondent received constitutionally adequate assistance of counsel. As explained above, the court of appeals cited nothing to suggest that he did not. Absent a showing that counsel's inexperience had an adverse impact on his conduct of the trial, that inexperience does not give rise to a Sixth Amendment violation. See, *e.g.*, *Daniels* v. *Maggio*, 669 F.2d 1075, 1082-1083 (5th Cir. 1982). Moreover, the court of appeals entirely ignored the fact that Colston was assisted prior to and during trial by Rivas, an experienced criminal defense attorney.

The court of appeals also believed that respondent was excused from the need to show specified errors in Colston's performance because, in its view, the defendant need not point to any particular failing "when circumstances hamper a given lawyer's preparation of a defendant's case" (App. A, *infra*, 3a-4a). This reasoning is flawed for at least two reasons. First, there has been no showing that circumstances had any effect on the preparation of the defense by Colston and Rivas. Second, even if there had been a factual determination that circumstances did bring some temporal or other pressures to bear on the attorneys in their preparation of the case, the same could probably be said of an attorney's preparation of almost any case. The proper question, then, is not whether the attorney's preparation of the case was "hampered," but whether the representation the defendant ultimately received was constitutionally adequate. A court therefore cannot simply "infer" a Sixth Amendment violation, as the court of appeals did here (App. A, *infra*, 3a-4a), without a firm basis for believing that asserted defects in preparation in turn caused a serious deficiency in counsel's performance at trial.

b. The decision of the court below also is inconsistent with the prevailing view of the courts of appeals that even if counsel's performance is found to have been below the range of reasonable competence, relief is not afforded under the Sixth Amendment absent some finding of prejudice or likely prejudice to the defendant or an adverse impact on the conduct of his case.[7] See generally *Washington* v. *Strickland*, 673 F.2d 879, 895-902 (5th Cir. 1982) (collecting cases in the circuits).[8] See also *Chambers* v. *Maroney*, 399 U.S. 42, 53-54 (1970); cf. *Cuyler* v. *Sullivan*, 446 U.S. 335, 348 (1980). The

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[7] See, *e.g.*, *United States* v. *Green*, 680 F.2d 183, 188 (D.C. Cir. 1982); *United States* v. *Wood*, 628 F.2d 554, 559 (D.C. Cir. 1980) (en banc); *United States* v. *Decoster*, 624 F.2d 196, 208 (D.C. Cir.) (en banc) (plurality opinion), cert. denied, 444 U.S. 944 (1979); 624 F.2d at 232 (MacKinnon, J., concurring); *United States* v. *Aulet*, 618 F.2d 182, 188 (2d Cir. 1980); *United States* v. *Baynes*, No. 81-1620 (3d Cir. Aug. 11, 1982) slip op. 17–21; *Marzullo* v. *State of Maryland*, 561 F.2d 540, 546 (4th Cir. 1977), cert. denied, 435 U.S. 1011 (1978); *Boyd* v. *Estelle*, 661 F.2d 388, 389 (5th Cir. 1981); *United States* v. *Murzyn*, 631 F.2d 525, 534 (7th Cir. 1980), cert. denied, 450 U.S. 923 (1981); *United States* v. *Kelly*, No. 82–1074 (8th Cir. Sept. 2, 1982) slip op. 3; *Long* v. *Brewer*, 667 F.2d 742 (8th Cir. 1982); *United States* v. *Donn*, 661 F.2d 820, 824 (9th Cir. 1981); *Cooper* v. *Fitzharris*, 586 F.2d 1325, 1331-1333 (9th Cir. 1978) (en banc), cert. denied, 440 U.S. 974 (1979); see also *United States* v. *Renfro*, 600 F.2d 55, 58 (6th Cir.), cert. denied, 444 U.S. 941 (1979). But see *Wiley* v. *Sowders*, 647 F.2d 642, 650 (6th Cir.), cert. denied, 454 U.S. 1091 (1981) (question whether prejudice must be shown remains open). Indeed, the Tenth Circuit previously had indicated that prejudice must be shown, *Dyer* v. *Crisp*, *supra*, 613 F.2d at 278, a position abandoned in *Golub*, *King*, and the instant case.

[8] As explained in *Washington* v. *Strickland*, *supra*, 673 F.2d at 895-902, there is some divergence among the circuits regarding the *degree* of prejudice that must be shown and whether a showing of prejudice is an element of establishing a Sixth Amendment violation or simply a requirement for obtaining relief. Cf. *United States* v. *Morrison*, 449 U.S. 361, 364 (1981).

view of these circuits is consistent with this Court's recent decision in *United States* v. *Morrison*, 449 U.S. 361 (1981).

In *Morrison*, the Court stressed that cases involving deprivations of the Sixth Amendment right to counsel are subject to the general rule that remedies should be tailored to the injury suffered as a result of the constitutional violation and should not unnecessarily infringe upon the competing societal interest in the administration of justice. 449 U.S. at 364. After reviewing its prior decisions, the Court explained (*id.* at 365):

> Our approach has thus been to identify and then neutralize the taint by tailoring relief appropriate in the circumstances to assure the defendant the effective assistance of counsel and a fair trial. The premise of our prior cases is that the constitutional infringement identified has had or threatens some adverse effect upon the effectiveness of counsel's representation or has produced some other prejudice to the defense. Absent such impact on the criminal proceedings, however, there is no basis for imposing a remedy in that proceeding, which can go forward with full recognition of the defendant's right to counsel and to a fair trial.

Here, there has been no showing that any errors in counsel's performance, assuming there were any of significance, had an adverse impact on the defense. Absent such an adverse impact in the criminal proceeding itself, "there is no basis for imposing a remedy in that proceeding" (*ibid*) by reversing respondent's convictions.

The court of appeals attempted to reconcile its holding with this Court's decision in *Morrison* by observing (App. A, *infra*, 3a) that nothing in *Morrison* suggests that a "substantial threat [of prejudice]" (449 U.S. at 365) warranting reversal of a conviction "may not be inferred from the circumstances of pretrial and trial representation" (App. A, *infra*, 3a). Even assuming,

however, that a "substantial threat of prejudice" might be inferred in unusual circumstances despite the absence of any showing of specific failings by counsel, nothing in the circumstances of this case indicates that such an inference would be warranted.

c. The court of appeals expressed the view that it was not necessary to identify specific failings of counsel in a case in which the lawyer's preparation might have been hindered, because, it believed, an appellate court cannot say "precisely how a given case would have been handled by a reasonably diligent and properly prepared lawyer" (App. A, *infra*, 3a).[9] We submit, however, that the court of appeals clearly erred in believing that it was somehow inappropriate or unfair to require respondent to make a showing that his lawyer's performance was outside the range of reasonable competence.

If the basis of a defendant's claim is that the lawyer who represented him did not adequately prepare, he should be capable of demonstrating the nature of counsel's omissions—*e.g.*, by identifying a witness who should have been, but was not, interviewed and called to testify; evidence that might have been unearthed with greater diligence; legal motions that would have been made by a more attentive lawyer; or a basis for impeaching government witnesses that might have been developed. If the defendant cannot make such a showing, then the asserted lack of preparation cannot be said to have rendered counsel's assistance "ineffective" in the sense of having had an adverse effect on the presentation of the defense, and there accordingly is no basis for finding a Sixth Amendment violation. The District of Columbia Circuit stressed this point in its seminal en banc decision in *United States* v. *Decoster*, 624 F.2d 196 (D.C. Cir.), cert. denied, 444 U.S. 944 (1979).

[9] Of course, as we have already explained, the court pointed to no evidence that Colston and his colleague were not themselves "reasonably diligent" and "properly prepared."

There the court rejected the dissenting judges' emphasis on specific duties of counsel in the abstract, and held instead that an asserted failure to investigate—a concrete example of a failure to prepare that was shown there and is absent here—must be considered in terms of whether there was any resulting impact on the prospects for a successful defense at trial. 624 F.2d at 208-213, 215-217 (plurality opinion); *id.* at 232-234, 244-245 (concurring opinion).

2. The decision below also requires review for reasons other than its inconsistency with prevailing case law regarding ineffective assistance of counsel claims generally. It also is in conflict with the decisions of this Court and the courts of appeals specifically addressing the question of when reversal of a conviction is appropriate because of the timing of the appointment of counsel or the denial of a request for a continuance to permit counsel additional time to prepare.

In *Chambers* v. *Maroney*, *supra*, the defendant claimed that the appearance of the Legal Aid attorney on the day of trial was so belated that it must be conclusively presumed that he could not have furnished effective assistance. The Court rejected the ineffective assistance of counsel claim because there was no showing of prejudice resulting from the late appearance of counsel. 399 U.S. at 53-54; see also *Mancusi* v. *Stubbs*, 408 U.S. 204, 214 (1972). In the instant case, there likewise was no showing that prejudice resulted from the fact that Colston and Rivas had "only" 25 days to prepare for trial. It therefore follows a fortiori from *Chambers* v. *Maroney* that there was no basis for finding ineffective assistance of counsel here.

Colston did move for a continuance to permit him to prepare for trial. The court granted that request, although it limited the time to prepare for trial to 25 days rather than the requested 30 days (6/19/80 Tr. 19). "The matter of continuance is traditionally within the discre-

tion of the trial judge" (*Ungar* v. *Sarafite*, 376 U.S. 575, 589 (1964)), and will be reviewed only for an abuse of discretion. See, *e.g.*, *United States* v. *Phillips*, [illegible] F.2d 87, 92-93 (7th Cir.), cert. denied, 451 U.S. 991 (1981). "Since the Constitution nowhere specifies any period which must intervene between the required appointment of counsel and trial, the fact, standing alone, that a continuance has been denied [or, as here, cut back,] does not constitute a denial of the constitutional right to assistance of counsel." *Avery* v. *Alabama*, 308 U.S. 444, 446 (1940).

A constitutional violation will be found only if the denial of the requested continuance results in the denial of opportunity for appointed counsel even to consult with the accused and prepare his defense, and thereby "convert[s] the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel." 308 U.S. at 446. In such circumstances, a court might conclude that circumstances affirmatively "*preclude*[*d*] the giving of effective aid in the preparation and trial of the case." *Powell* v. *Alabama*, 287 U.S. 45, 71 (1932) (emphasis added). See, *e.g.*, *Hawk* v. *Olson*, 326 U.S. 271, 276-278 (1945); *White* v. *Ragen*, 324 U.S. 760, 764 (1945). But where counsel has been afforded a minimum period of time to prepare—a period far exceeded by the 25 days allowed in this case—the defendant must at the very least make a showing that counsel could have done more at trial had additional time been granted. *Avery* v. *Alabama*, *supra*, 308 U.S. at 452. The decisions of other courts of appeals likewise require some concrete showing of prej-

udice from the denial of a continuance in such circumstances.[10] In this case, in contrast, there has been no such showing or finding.

3. The Tenth Circuit's approach in this case trivializes the Sixth Amendment issue by reducing it to an essentially arithmetic inquiry into the number of witnesses and exhibits in the case, the number of days counsel had to prepare, and the number of prior criminal cases handled by the attorney. Such a mechanical approach divorces the inquiry from any consideration of how counsel actually performed at trial and therefore from whether counsel rendered reasonably competent assistance.[11]

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[10] *United States* v. *Veatch*, 647 F.2d 995, 1004-1005 (9th Cir. 1981), cert. denied, No. 81-1764 (Apr. 26, 1982); *United States* v. *Phillips*, *supra*, 640 F.2d at 92-93; *United States* v. *Baduan*, 624 F.2d 1228, 1231 (4th Cir. 1980), cert. denied, 449 U.S. 1124 (1981). Indeed, the Tenth Circuit itself has recognized the same principle when it considered the issue in terms of a denial of a continuance, rather than the effective assistance of counsel. See, *e.g.*, *United States* v. *Gonzalez-Palma*, 645 F.2d 844, 846-847, cert. denied, 454 U.S. 869 (1981).

[11] While mail fraud prosecutions can be complex, there is little in this case to suggest that 25 days was not entirely adequate preparation time. After the initial grant of a continuance, it appears that neither respondent nor his counsel subsequently gave any indication to the court that further time was needed to complete investigation or trial preparation. And the existence of the fraud itself was convincingly established by clear and undisputed evidence of the check-kiting transactions. The only issue for the jury was respondent's role and responsibility for the fraudulent activities. This turned principally on the credibility of the testimony of his two co-defendants and several other witnesses who identified respondent as the principal participant in the affairs of Skyproof. In sum, the actual facts of this case did not confront respondent's counsel with a task of unusual complexity that would have placed the trial court on notice that a sua sponte grant of a further continuance was needed.

The abstract nature of the Tenth Circuit's decision is highlighted by the fact that the court ignored both that Colston was assisted prior to and at trial by an experienced criminal defense lawyer and that the trial court and respondent himself repeatedly expressed the view that Colston and his colleague had performed admirably. The court of appeals' reversal of the convictions on this record underscores the wisdom of the rule in other circuits that ineffective assistance of counsel claims ordinarily should be presented in the first instance to the trial court, which can conduct an evidentiary inquiry into the adequacy of counsel's preparation and performance and the impact of any asserted errors. See, *e.g.*, *United States* v. *Lurz*, 666 F.2d 69, 78 (4th Cir. 1981); *United States* v. *Aulet*, 618 F.2d 182, 185-186 (2d Cir. 1980); *United States* v. *Schreiber*, 599 F.2d 534, 538 (3d Cir.), cert. denied, 444 U.S. 843 (1979).

The Tenth Circuit's decision in this case is not an aberration; it is one of a series of cases involving claims of inadequate preparation by counsel, including *United States* v. *King* and *United States* v. *Golub*, *supra*,[12] in which that court has continued to apply a formula that eschews any inquiry into the actual impact on the defense presented at trial. See also *United States* v. *La Monte*, No. 81-1887 (10th Cir. July 27, 1982), slip op. 4. Moreover, the result of the court's emphasis on Colston's lack of prior experience in criminal cases will be to undermine the ability of the district courts in that circuit to appoint counsel who have not had extensive prior experience in criminal cases, for fear that they will be branded as inept even in the absence of any concrete indication that they performed in a substandard manner. Thus, the potentially significant practical con-

[12] At this writing, the government's petition for rehearing in *Golub* is still pending before the court of appeals, following a remand to the district court for certain evidentiary findings.

sequences of this decision for trial courts in making appointments of counsel and passing upon continuance requests are further reasons for review by this Court.[13]

CONCLUSION

The petition for writ of certiorari should be granted.[14]

Respectfully submitted.

REX E. LEE
Solicitor General
D. LOWELL JENSEN
Assistant Attorney General
EDWIN S. KNEEDLER
Assistant to the Solicitor General

OCTOBER 1982

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[13] Although other aspects of the right to counsel are involved in *Morris* v. *Slappy*, No. 81-1095, and *Jones* v. *Barnes*, No. 81-1794, in our view the ineffective assistance of counsel issues presented here are sufficiently distinct from the issues in those two cases that the petition should not be held pending the decision in those cases.

[14] The Court may wish to consider summary reversal, in view of (a) this Court's prior decisions establishing that a defendant raising a Sixth Amendment claim of ineffective assistance of counsel must show that his attorney's performance departed substantially from that rendered by reasonably competent defense counsel, (b) the Court's prior decisions regarding the showing that must be made to obtain a reversal of a conviction on the basis of a denial of a continuance or the timing of the appointment of counsel, and (c) the absence of any finding that respondent was prejudiced or his counsel's performance adversely affected by the fact that counsel had "only" 25 days to prepare for trial.

APPENDIX A

UNITED STATES COURT OF APPEALS,
TENTH CIRCUIT.

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE,

v.

HARRISON P. CRONIC,
DEFENDANT-APPELLANT.

No. 80-1955.

April 19, 1982.

David L. Russell, U.S. Atty., John E. Green, First Asst. U.S. Atty., Oklahoma, City, Okl., for plaintiff-appellee.

Harrison P. Cronic, defendant-appellant, pro se.

David W. Duncan, Duncan & Chew, Durango, Colo., for defendant-appellant.

Before SETH, Chief Judge, SEYMOUR and PECK*, Circuit Judges.

JOHN W. PECK, Circuit Judge.

The dispositive issue on appeal in this case is whether appellant Cronic was denied effective assistance of counsel in the trial at which he was convicted of eleven counts of mail fraud.

The relevant facts are as follows. Cronic was indicted, with two codefendants, on thirteen counts of mail fraud and unlawful use of a fictitious name, 18 U.S.C. §§ 1341 & 1342. The indictment was handed

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* Honorable John W. Peck, United States Circuit Judge for the Sixth Circuit, sitting by designation.

down on Feb. 5, 1980, nearly five years after the alleged commission of the offenses charged. Cronic and two business associates, Merritt and Cummings, were charged in this indictment with kiting checks between banks in Tampa, Florida and Norman, Oklahoma. The checks were drawn on the accounts of Skyproof Manufacturing, Inc., a Florida company that was held out as a manufactory of roof trusses for mobile homes.

The government's evidence at trial purported to show that the alleged check-kiting scheme was masterminded by Cronic, for whom Skyproof was a "front". Principal government witnesses were former codefendants Merritt and Cummings, who had plea-bargained. These witnesses identified Cronic as the true head of Skyproof, which was nominally held by Cummings. The government's other proof comprised the testimony of seventeen witnesses from four states, as well as over fifty documentary exhibits.

At trial Cronic was represented by a court-appointed attorney who specialized in real-estate law. This attorney's experience in federal criminal practice is not clear from the record, but Cronic's defense was at best his second venture into that field. Court-appointed counsel had twenty-five days to prepare Cronic's case. The government's investigation of that case yielded, as the United States' attorney testified before the grand jury, literally thousands of documents, including hundreds of checks. Defense counsel's trial strategy may be fairly summarized as putting the government to its proofs, pointing an accusatory finger at one of the allegedly defrauded banks, and arguing that the banks' toleration of overdrafts was an informal extension of credit to a legitimate business.

Cronic was convicted on eleven of thirteen counts and given a committed sentence of twenty-five years plus an $11,000 fine. He argues that this sentence was based on erroneous information, but our disposition of this

case moots this issue. We vacate Cronic's convictions on the grounds that he was denied effective assistance of counsel.

I. *Morrison* and the Burden of Showing Prejudice from Violations of the Sixth Amendment.

The government argues that Cronic has not shown on appeal that his trial lawyer failed to exercise "the skill, judgment and diligence of a reasonably competent defense attorney", which is how the Sixth Amendment right to assistance of counsel is described in this Circuit. See *Dyer* v. *Crisp*, 613 F.2d 275, 278 (10th Cir.) (en banc), *cert. denied*, 445 U.S. 945, 100 S.Ct. 1342, 63 L.Ed.2d 779 (1980). Cases after *Dyer* have established that when circumstances hamper a given lawyer's preparation of a defendant's case, the defendant need not show specified errors in the conduct of his defense in order to show ineffective assistance of counsel. See *United States* v. *King*, 664 F.2d 1171, 1172-73 (10th Cir. 1981); *United States* v. *Golub*, 638 F.2d 185, 187 (10th Cir. 1980). This is an eminently reasonable rule, for there is no way an appellate court can say precisely how a given case would have been handled by a reasonably diligent and properly prepared lawyer. The prejudice from lack of preparation and experience cannot be nicely weighed.

There is no conflict between the rule of *King* and *Golub* and the Supreme Court's opinion in *United States* v. *Morrison*, 449 U.S. 361, 101 S.Ct. 665, 66 L.Ed.2d 564 (1981). In *Morrison* the Court held that pretrial "interference" with the right to counsel did not warrant the most drastic remedy of dismissing an indictment "absent demonstrable prejudice, or substantial threat thereof". *Id.* at 365, 101 S.Ct. at 667. Nothing in *Morrison* suggests that "a substantial threat of prejudice" may not be inferred from the circumstances of pretrial and trial representation. Nothing in

Morrison suggests that reversal of a conviction may not be "relief appropriate in the circumstances to assure the defendant the effective assistance of counsel and a fair trial". *Id.* at 365, 101 S.Ct. at 667.

II. Application of *King-Golub* Tests to Cronic's Case.

Under *King* and *Golub*, the circumstances to be considered in determining whether inadequacy of representation may be inferred without proof of specific prejudice at trial include: "(1) the time afforded for investigation and preparation; (2) the experience of counsel; (3) the gravity of the charge; (4) the complexity of possible defenses; and (5) the accessibility of witnesses to counsel." *King, supra*, 664 F.2d at 1173; *Golub, supra*, 638 F.2d at 189. Comparison of Cronic's case with King's is apt. King's attorney was given 27 days to research and prepare a defense to a tax fraud charge that the government developed over a three year period. Cronic's attorney was given 25 days[1] to prepare a defense to a mail fraud charge that the government had developed over a four-and-one-half year period. King faced a sentence of up to five years; Cronic faced a sentence of up to sixty-five years, and was in fact sentenced to twenty-five years. *King* does not note the

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[1] Cronic's court-appointed attorney asked for a minimum of thirty days to prepare. This was the minimum figure suggested by Cronic's previous attorney, a former U.S. Attorney with considerable experience in criminal practice. The court granted Cronic's court-appointed attorney a twenty-five day continuance. Cronic himself asked for a more experienced attorney, but was told that if he wanted to choose his attorney he should hire one. The aptness of that remark is underscored by Cronic's professed ability to come up with $350,000 to reimburse a defrauded bank, *after* he had been convicted.

It is also of interest that Cronic declared his indigency after stating in a pro se motion that it was "unreasonable of [Cronic's retained counsel] to believe he would not receive his fee in full".

accessibility of witnesses to counsel. In Cronic's case no defense witnesses appeared, but the government's witnesses came from four different states. Cronic lived in Florida and Georgia, his attorney in Oklahoma.

The only material distinction between King's case and Cronic's is that the former was apparently more complex, involving approximately 200 witnesses and 5,000 exhibits. See 664 F.2d at 1172. Nevertheless, Cronic's case was not an ideal one for an aspiring criminal defense lawyer to cut his teeth on. As Judge Doyle stated in *Golub*, "[m]ail fraud cases tend to be factually and legally complex. [Golub's case] called for a lawyer who had experience in criminal trials and/or knowledge of fraud claims". 638 F.2d at 188. If Cronic's case was indeed simpler than King's, this advantage was offset by his appointed counsel's total or near-total lack of relevant experience.[2] In sum, we hold that *King* controls and requires reversal of Cronic's conviction.

We do not hold that an attorney's lack of relevant experience inevitably gives rise to ineffective assistance of counsel. We simply hold that on the facts of this case, applying the criteria set down in *King* and *Golub*, Cronic cannot be said to have been adequately represented.

III. Issues on Retrial

Cronic raises several other issues that might arise again should he be retried. He argues that the trial court erred in allowing one Levine, who once represented Skyproof, Cronic, and codefendant Cummings, to withdraw as Cronic's counsel and to continue as Cummings'. Cummings, as noted, plea-bargained and

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[2] Court-appointed counsel's prior experience in federal criminal practice was limited (as told to Cronic in court) to "involvement" in one other case. Counsel told the jury during opening argument that Cronic's defense was his "first trial".

testified against Cronic. Her testimony portrayed Cronic as the true perpetrator of the alleged check-kiting. Cross-examination by Cronic's trial counsel stressed that Cummings was the legal owner of Skyproof, through which the kiting was supposedly done. This bears out that there was a clear conflict of interest between Cronic and Cummings, and the trial court was amply justified in allowing Levine to withdraw as Cronic's counsel.

There was likewise no error in allowing Levine to continue as Cummings' attorney. Levine asserted that he learned no damaging privileged information in the course of his prior representation of Cronic. His assertions were borne out by the events at trial: Levine himself did not testify, and Cummings' testimony raises no doubts of any breach of Cronic's attorney-client privilege. Cummings' own constitutional right to counsel of her own choosing outweighed any interest in avoiding the vague "improprieties" alleged by Cronic.

Cronic also argues that the trial court erred in not requiring disclosure of grand jury attendance records so that Cronic could determine if the indictment was found by twelve "informed" grand jurors. Cronic relies in this argument particularly on *United States* v. *Leverage Funding Systems, Inc.*, 478 F.Supp. 799, 800 (C.D.Cal. 1979). *Leverage Funding* was reversed by the Ninth Circuit eight months before the filing of appellant's briefs. See *United States* v. *Leverage Funding Systems, Inc.*, 637 F.2d 645, 648–49 (9th Cir. 1980), *cert. denied*, 452 U.S. 961, 101 S.Ct. 3110, 69 L.Ed.2d 972 (1981). We agree with the Ninth Circuit that there is no statutory or legal requirement that at least twelve grand jurors who vote to indict have heard all the evidence relevant to that indictment. *See id.* The trial court therefore did not err in refusing to order discovery of grand jurors' attendance records. Nor did the district court abuse its discretion in refusing to order

pretrial disclosure of testimony before the grand jury, for Cronic had shown no particularized need for such disclosure. *See e.g., United States* v. *Parker*, 469 F.2d 884, 889 (10th Cir. 1972).

The judgment of conviction is hereby vacated, and the case is remanded for further proceedings not inconsistent herewith.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MARCH TERM

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE,

v.

HARRISON P. CRONIC,
DEFENDANT-APPELLANT.

No. 80–1955

(D.C. No. CR-80-21-E)

April 19, 1982

JUDGMENT

Before Honorable Oliver Seth, Honorable Stephanie K. Seymour, and Honorable John W. Peck*, Circuit Judges

This cause came on to be heard on the record on appeal from the United States District Court for the Western District of Oklahoma, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is vacated. The cause is remanded to the United States District Court for the Western District of Oklahoma, for further proceedings in accordance with the opinion of this Court.

/s/ _____
HOWARD K. PHILLIPS, *Clerk*

A true copy
HOWARD K. PHILLIPS,
CLERK, U.S. COURT OF
APPEALS, TENTH CIRCUIT

BY
/S/ OPAL A. CARTER
Deputy Clerk

---

* Honorable John W. Peck, United States Circuit Judge for the Sixth Circuit, sitting by designation.

APPENDIX C

UNITED STATE COURT OF APPEALS
FOR THE TENTH CIRCUIT

MAY TERM

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE,

v.

HARRISON P. CRONIC,
DEFENDANT-APPELLANT.

No. 80-1955

July 16, 1982

Before Honorable Oliver Seth, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan and Honorable Stephanie K. Seymour, Circuit Judges.

This matter comes on for consideration of appellee's petition for rehearing and suggestion for rehearing en banc in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the panel to whom the case was argued and submitted.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

/s/ _____
HOWARD K. PHILLIPS,
Clerk

Supreme Court, U.S.
FILED
JUL 15 1983
ALEXANDER L. STEVAS
CLERK

No. 82-660

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

HARRISON P. CRONIC

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JOINT APPENDIX

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CERTIORARI GRANTED FEBRUARY 22, 1983

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*The opinion of the court of appeals has been reprinted in the petition for a writ of certiorari and has not been reproduced.

CRIMINAL DOCKET—U.S. DISTRICT COURT

CR 80-21

CRONIC, HARRISON P.

U.S. Title/Section	Offenses Charged
18:1341-7	Devising a scheme & artifice to defraud & obtain money fm banks in OK & FL by using the US Postal Service Cts 1-13

2-5-80	ENT GJ ret w/Indict, order to file & for warrant
2-5-80	Issd Warrant
2-5-80	Filed INDICTMENT
	• • •
2-22-80	Filed dft's Mtmo of Reciprocal Discovery
2-22-80	Filed Arnold D. Levine's Entry of Appear on behalf of dft
2-22-80	ENT ARRAIGNMENT: Ent Order: For purposes of this proceeding Cnsl Levine adm to ct's bar. Dft apps w/retained cnsl; is fully apprised; pleads NOT GUILTY to all cts; given until 2-28-80 to file mtns & plf to respond by 3-5-80 or jury dkt wk of 3-10-80; dft obj to less than 30 days before trial purs to Speedy Trial Act;
	• • •
2-28-80	Filed dft's Obj to Trial Setting of 3-10-80 & Mtn to Ext Time to File PT Mtns
2-29-80	ORDER grtg dfts until 3-10-80 to file mtns; case reset for jury trial 4-14-80
3-3-80	MOTION of dft for Lv to Adopt Mtns of Co-Dfts Herein & to File Supple Mtns if Appropos w/Brf in Sup
3-3-80	MOTION of dft for Discvy of Matters Pertaining to GJ w/Brf in Sup
3-3-80	MOTION of dft for Discovery of Matters Occurring Before the Indicting GJ & To Dism Indict w/Brf in Sup
3-3-80	MOTION of dft for Inquiry of Electronic Surveillance Memo of Law w/Brf in Sup
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3-3-80	MOTION of dft Purs to Title 18:USC, Section 3504 w/Memo
3-3-80	MOTION of dft to Compel Disclosure of Existence & Substance of Promises of Immunity, Leniency or

	Preferential Treatment & Information About Govt Employees & Informants
3-3-80	MEMORANDUM in Sup of above
3-3-80	REQUEST of dft for Notice of Intention to Use Evidence w/Memo in Sup
3-3-80	REQUEST of dft for Discovery & Inspection
3-3-80	MEMORANDUM of dfts in Sup of Req for Discovery & Inspection—ws
3-3-80	MOTION of dft to Compel the Disclosure of All Evidence Favorable to the Dft
3-3-80	MEMORANDUM in Sup of Mtn to Compel the Disclosure of All Evidence Favorable to the Dfts
3-3-80	MOTION of Dft for Retention & Preservation of Rough Notes & Memoranda w/Brf in Sup
3-3-80	MOTION of dft to Dismiss & Memorandum
3-3-80	MOTION of dft for Severance & Memorandum in Support Thereof
3-10-80	MOTION of dft for Transcription & Production of GJ Test & for Production of Exhs Subponaed by the GJ & for Other Relief
3-10-80	MOTION to Dism
3-10-80	BRIEF in Sup of Mtn to Dism
	• • •
3-11-80	RESPONSE by govt to PT Mtns of Dfts Cronic & Cummings
	• • •
3-28-80	MOTION of dft for Continuance of Trial
4-1-80	ENT ORDER trans case to Judge Eubanks
	• • •
4-2-80	ORDER on mtns; dft's Mtn for Retention & Preservation of Rough Notes & Memoranda is grtd; dft's Request for Discovery & Inspection is grtd in part & denied in part; dft's Mtn to Compel the Disclosure of All Evidence Favorable to dfts is grtd in part & denied in part; dft's Req for Notice of Intention to Use Evidence is moot; Mtn of dfts for Severance is overruled; dft's Mtn to Compel Disclosure of Existence & Substance of Promises of Immunity, Leniency or Preferential Treatment & Information About Govt Employees & Informants is o/r'd; dft's Mtn for Production of Govt Immunity Papers & Related Docs is o/r'd; dft's Mtn for Lv to Adopt Mtns of Co-dfts Herein & to File Supple Mtns if Apropos is overruled; dft's Mtn for Inquiry of Elec

Surveillance & Mtn Purs to 18:3504 is overruled; dft's Mtn for Transcription & Prod of GJ Test & for Prod of Exhs Subp'd by GJ & for Other Relief is moot; dft's Mtn for Discovery of Matters Pertaining to GJ is o/r'd; dft's Mtn for Discovery of Matters Occurring Before the Indicting GJ & to Dism the Indict is o/r'd; dft's Mtns to Dismiss are overruled; 4-7-80 at 10 am in USA's office is designated as time & place for govt to furnish movant items (Daugherty) ve

* * *

4-10-80 ENT ORDER grtg continuance of trial & striking case fm jury trial on 4-14-80 * * *

4-10-80 SUPPLEMENTAL MOTION of dft for Continuance of Trial

4-30-80 JURY: Mon, 5-12-80, 9:30 am (Eubanks)

* * *

5-8-80 LETTER fm ct to dft's atty that trial will not be started until sometime after 6-1-80 (Eubanks)

* * *

5-23-80 JURY: 6-16-80, 9:30 am (Eubanks)

6-5-80 MOTION of dft's atty for Lv to W/D as Cnsl for Dft

6-6-80 ENT ORDER on Arnold D. Levine's Mtn for Lv to W/D as cnsl for dft Cronic—matter can be hrd w/o presence of Mr. Levine & it is urgent that same be hrd so other cnsl can be employed or apptd; both dfts are dir'd to app in per for said hrg to be hrd Thurs, 6-12-80, 9:30 am (Eubanks)

* * *

6-11-80 MOTION of dft to Deny the Withdrawal of Mr. Arnold D. Levine as cnsl for Harrison P. Cronic

6-12-80 ENT HRG ON LEVINE'S MTN FOR LV TO W/D AS CNSL FOR DFT CRONIC: dfts Cronic & Cummings app in per; Mr. Berkowitz apps for Mr. Levine; Mtn continued until 6-19-80; 9:30 am unless Mr. Levine able to app sooner; ct will appt cnsl for Mr. Cronic in the event the ct grants Mr. Levine's Mtn to w/d (Eubanks)

6-12-80 ORDER that Chris E. Colston be apptd as substitute cnsl until hrg is held (Eubanks)

6-13-80 REPLY of Arnold D. Levine to Mtn Filed by Harrison P. Cronic

6-19-80 ENT EVID HRG ON MR. ARNOLD LEVINE'S MTN TO WITHDRAW: dfts' Cronic & Cummings

app in per; Mr. Levine sworn, test hrd; Mr. Levine's Mtn to W/d grtd; Mr. Colston will serve as dft Cronic's cnsl (Eubanks)

6-19-80 CJA 20 apptd Chris E. Colston as dft's cnsl

6-19-80 ENT HRG ON DFT CRONIC's MTN FOR CONTINUANCE: dft Cronic's Mtn for Continuance grtd; case cont'd until July 14, 1980, 9:30 am; dft Cummings waives speedy trial rights; dft Cronic grtd lv to file Mtn for Investigator; Dft Cronic's req for apptmt of other legal cnsl is denied (Eubanks)

6-19-80 MOTION of dft for Continuance

6-19-80

* * *

6-20-80 JURY: 7-14-80, 9:30 am (West)

6-24-80 MEMORANDUM of dft of Reciprocal Discovery

* * *

6-26-80

7-1-80 APPLICATION & ORDER to Issue Subp at Govt Expense to Robert W. Bumgarner, John L. Brown, Larry V. Howell, Lee Martin, Bill Harrison & Edward W. Frantel on 7-14-80, 9:30 am

7-14-80 ENTER JURY TRIAL: dft apps in per; ptys announce ready; jury duly empaneled & admonished; rule invoked on dft's mtn; plf & dft make openingstmt; plf presents case in chief w/test of wits; plf & dft make opening stmt; plf presents case in chief w/test of wits; plf exhs 1-1C, 2-2C, 3-3C, 4, 4A, 5-5C, 6-6B, 7-7B, 8-8D, 9-9E, 10-10E, 11-11H, 12-12F, 13-13E, 35, 36, 43, 44, adm; ct adjourns to 7-15-80, 9:30 am (Eubanks)

7-15-80 ENTER FURTHER JURY TRIAL: plf continues case w/test of wits; plf's exhs 4B, 5D, 5E, 5F, 6C, 7C, 7D, 8E, 8F, 8G, 9F, 9G, 10F, 10G, 10H, 11I, 11J, 11K, 11L, 12G, 12H, 12I, 12J, 13F, 13G, 13H, 13I, 13J, 14-34, 41, 42, 45, 46, 46A, 47-49, 2, 5-8 adm; ct adjourns to 9:30 am, 7-16-80 (Eubanks) dk

7-16-80 ENT FURTHER JURY TRIAL: plf continues case in chief w/test of wits+f's exhs 37-40, 50-52 adm; dft's exhs 1, 10, 11 adm; plf rests; ct adjourns to 10 am, 7-17-80 (Eubanks)

* * *

7-17-80 ENTER FURTHER JURY TRIAL: dft's mtn for D.V. is denied; ptys rest; closing args; ct instructs

jury; bailiff sworn; jury retires to deliberate at 2:45 pm; jury returns at 5 pm w/verdict GUILTY on cts 1, 4-13 & not guilty onc ts 2 & 3; case ref'd to Prob Ofc; remanded to USM to await sentencing; bond raised to $30,000 C/S (Eubanks)

* * *

8-28-80 ENTER SENTENCING: sent to cust of AG 5 yrs on ct 1; 5 yrs on ea of cts 4 thru 7 consec w/ea other & consec w/ct 1; 5 yrs on ea of cts 8-13 conc w/ea other & conc w/ct 7; ct exonerated dft's 10%, $5,000 appear bond; dft advised of right to appeal; bond fixed in amt of $30,000 C/S; remanded to USM (Eubanks)

8-28-80 ORDER of Jdgm & Commitment

* * *

A True Copy
Herbert T. Hope, Clerk
by /s/ Sam Leigh Stevenson

GENERAL DOCKET

COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 80-1955 G75 F29 1126

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

v.

HARRISON P. CRONIC, DEFENDANT-APPELLANT.

DATE	FILINGS-PROCEEDINGS
9-11-80	Case docketed. Record on appeal due 9/15/80.
9-18-80	ROA.DUE. Record on appeal due 10/15/80
9-20-80	NAPR.F Notice of appearance filed by green as attorney for appellee.
	* * *
11-18-80	Appellants motion to substitute attorney James P. Linn for Chris E. Colston filed. Orig.
	* * *
1-21-81	Record on appeal filed, Vol I (pleadings) (294pp.), Vol II-V (exhibits), Vol VI (transcript) (605pp.), Vol VII (transcript) (26pp.), Vol VIII (transcript) (15pp.), Vol IX (transcript) (17pp.) all original, [t.p. 957].
1-30-81	Record on appeal filed. Vols. VI, VII & VII (transcripts), copies.
1-30-81	Appellant's motion for substitution of Attorney Linn for Attorney Colston denied. Barrett & McKay David William Duncan appointed as attorney for the appellant. Appellant's brief due 1/20/81.
2-2-81	Chris Colstron's motion to withdraw as attorney for appellant filed. Moot—No action necessary—see order of 1/30/81 appointing other counsel.
2-17-81	Appellant's motion to extend time to 3/14/81 to file brief filed. Order granting appellant's motion to extend time to 3/14/81 to file brief
2-20-81	Notice of appearance filed by Duncan as attorney for appelle
3-7-81	M.EXTM.BR.F. Appellant's motion to extend time to 4/6/81 to file brief filed,

3-10-81	Order granting appellant's motion to extend time to 4/6/81 to file brief
3-18-81	Appellant's motion to supplement record on appeal submitted to panel.
3-27-81	Ordered appellant's motion to supplement record on appeal granted
	Record on appeal filed, Supplemental Vol I (pleadings), Orig and 1 cc. (prepared by Court of Appeals per HKP)
4-1-81	Record on appeal filed, Supplemental Vol I (pleadings) 181 pp. orig and 1 cc (prepared by District Court)
4-2-81	Appellant's motion for extension of time to 4/28/81 to file brief filed,
4-3-81	Granted appellant's motion for extension of time to 4/28/81 to file brief
	* * *
4-22-81	Appellant's motion to dismiss attorney Duncan for appellant filed,
	M.APPT.ATTY.F. Appellant's motion to appoint attorney filed
7-27-81	Appellee's motion to file brief time having expired filed, orig. only. c/s.
4-22-81	Appellant's motion to dismiss attorney Duncan submitted to panel.
	Appellant's motion to appoint attorney submitted to panel.
4-24-81	David W. Duncan's motion to withdraw as attorney for appellant filed.
	Appellant's (Duncan's) motion to extend time to file appellant's brief to no specified time filed
	Duncan's motion to withdraw as attorney for appellant submitted to panel.
	Appellant's motion for extension of time to file brief submitted to panel.
5-7-81	Order denying Duncan's motion to withdraw as attorney * * *
	BR.DUE—appellant's brief due 5/28/81; appellant may file supplemental pro se brief 21 days thereafter
4-17-81	appellant's pro se motion to reverse district court's denial of new trial filed

5-7-81	order that appellant's pro se motion to reverse district court's denial of new trial be filed as of 4/17/81 and submitted to Court together with briefs.
5-4-81	AFDT.F. Appellant's (pro se) affidavit filed.
5-28-81	BR.F. Appellant's brief filed,
5-26-81	RMK.F. Appellant's pro se additions and corrections to supplement to the record on appeal filed March 7, 1981, filed, Orig. & 10 c.. c/s.
6-17-81	BR.F. Pro Se appellant's brief filed,
6-24-81	Appellee's motion for extension of time to 7/22/81 to file brief filed
	Granted appellee's motion for extension of time to 7-22-81 to file brief
7-27-81	Appellee's motion to file brief time having expired granted
7-27-81	BR.F. Appellee's brief filed
8-4-81	Appellant's motion for extension of time to 8/24/81 to file reply brief filed
	Granted appellant's motion for extension of time to 8/24/81 to file reply brief
8-24-81	Appellant's reply brief filed
8-25-81	Appellant's (pro se) reply brief filed
10-23-81	Hearing set for November, 1981, Term—Denver, Colorado
11-4-81	Pro se appellant's (Cronic's) motion to participate in oral argument filed
11-5-81	Pro se appellant's motion to participate in oral argument submitted to panel.
11-10-81	Denied pro se appellant's motion to participate in oral argument disposed of by Seth
11-19-81	[Argued and submitted]—Seth, Seymour, Peck
12-2-81	Letter from appellant filed, Orig. & 3cc. c/s.
	Letter from appellant submitted to panel.
4-19-82	Published, signed opinion filed. seth, Seymour, Peck Writing Judge is Peck
	Judgment vacated. The cause is remanded.
	* * *
6-3-82	Appellee's petition for rehearing en banc filed.
6-3-82	Appellee's petition for rehearing en banc submitted to panel.
6-25-82	Appellant's response to appellee's petition for rehearing en banc filed. Orig., 9cc., c/s.
	Appellant's response to appellee's petition for rehearing en banc submitted to panel.

7-16-82	Denied, appellee's petition for rehearing en banc. Disposed of by en banc panel. Parties notified by mail.
7-26-82	MDT.ISS. Mandate issued to district court.

* * *

10-22-82	P.WRIT.CERT.F Notice of appellee's filing for certiorari on 10/14/82 Supreme Court No. 82-660.

No. CR80 21-D

UNITED STATES OF AMERICA, PLAINTIFF

v.

HARRISON P. CRONIC, WYLIE C. MERRITT, JR., AND CAROLYN S. CUMMINGS, DEFENDANT

Violations: 18 USC 1341, 2

INDICTMENT

The Grand Jury charges:

COUNT I

That from on or about the 26th day of March, 1975, and continuing thereafter up to on or about the 7th day of October, 1975, at Oklahoma City, Oklahoma County, and Norman, Cleveland County, both within the Western Judicial District of Oklahoma; at Tampa, Hillsborough County, Middle Judicial District of Florida; in the State of Illinois; and at other places to the grand jurors unknown,

HARRISON P. CRONIC,
WYLIE C. MERRITT, JR., and
CAROLYN S. CUMMINGS

devised and intended to devise a scheme and artifice to defraud and to obtain money from banks in Oklahoma and Florida by inducing said banks in the names of "Skyproof Manufacturing, Inc." and Wylie C. Merritt, Jr., to pay out substantial sums of cash, furnish deposit credits and to obligate the said banks to pay out cash or furnish deposit credits for a series of insufficient funds checks, without the intent and capability of performance on their parts because they knew that said series of written checks were insufficient. The scheme and artifice as devised by Harrison P. Cronic, Wylie C. Merritt, Jr., and Carolyn S. Cummings was also to obtain money by means of the following false and fraudulent pretenses, representations and promises, well knowing at the time that the pretenses, presentations and promises would be false when made in substance as fol-

lows: That by the continuous issuance of insufficient funds checks on Skyproof Manufacturing, Inc., and Wylie C. Merritt, Jr., or by "floating" the series of insufficient funds checks between the said banks, they thereby created false or inflated balances in the various bank accounts of Skyproof Manufacturing, Inc., and Wylie C. Merritt, Jr.; to deposit in various bank accounts of two banks in Norman, Oklahoma, and one in Tampa, Florida, assigned and/or controlled by said defendants, checks drawn on banks in Oklahoma and Florida issued in the name of Skyproof Manufacturing, Inc., and Wylie C. Merritt, Jr., well knowing at the time of issuance that there were not sufficient funds on deposit to cover said checks.

The true facts were that the "Skyproof Manufacturing Inc." at the material times and places was largely a facade and pretense to permit the withdrawal of large sums of money from the said banks; that Harrison P. Cronic, Wylie C. Merritt, Jr., and Carolyn S. Cummings, at the time of devising such scheme or artifice to defraud, and making such pretenses, representations and promises, and at the time of the mailings in question, did not have the intent, resources or capability of covering all the insufficient funds checks issued by or at their direction between the said banks; that they kept insufficient funds checks "floating" between said banks to create inflated or false balances in the various bank accounts controlled by them.

1. It was a part of the scheme and artifice to defraud that on or about April 22, 1975, Carolyn S. Cummings, at Harrison P. Cronic's direction, did open checking account 00-777-3 in the name of Skyproof Manufacturing, Inc., at Metropolitan Bank, Tampa, Florida.

2. It was a further part of the scheme and artifice rior to March 26, 1975, Wylie C. Merritt, Jr., at Harrison P. Cronic's direction, did open checking account 015 4268 in his name at First National Bank and Trust Company, Norman, Oklahoma.

3. It was a further part of the scheme to defraud that on or about June 19, 1975, Wylie C. Merritt, Jr., at Harrison P. Cronic's direction, did open checking account 01 8878 in

the name of Skyproof Manufacturing Co., Inc., at Norman Bank of Commerce, Norman, Oklahoma.

4. It was a further part of the scheme and artifice that beginning on or about March 26, 1977, and continuing June 15, 1975, Wylie C. Merritt, Jr., at Harrison P. Cronic's direction, did deposit at First National Bank and Trust Co., Norman, Oklahoma, a series of checks, totaling $35,200.00, drawn by Carolyn S. Cummings, at Harrison P. Cronic's direction, on the Skyproof Manufacturing, Inc. account in Metropolitan Bank, Tampa, Florida, and would and did receive cash, bank obligations and deposit credits from said First National Bank and Trust Co., knowing at the times the checks were so deposited that there were insufficient funds on deposit in the Skyproof Manufacturing, Inc. account at Metropolitan Bank to pay the checks.

5. It was a further part of the scheme and artifice that Harrison P. Cronic, Wylie C. Merritt, Jr., and Carolyn S. Cummings did cause the checks, drawn as aforesaid, to be forwarded by mail from Fidelity Bank at Oklahoma City, Oklahoma, to Northern Chicago Trust Company, Chicago, Illinois.

6. It was a further part of the scheme to defraud that beginning on or about June 23, 1975, and continuing until on or about October 7, 1975, Carolyn S. Cummings, Harrison P. Cronic, and Wylie C. Merritt, Jr., did and/or cause to be deposited at Norman Bank of Commerce, Norman, Oklahoma, a series of checks totaling $4,143,573.95, drawn by Carolyn S. Cummings on the Skyproof Manufacturing, Inc. account in Metropolitan Bank, Tampa, Florida, and would and did receive cash, bank obligations, and deposit credits from Norman Bank of Commerce, knowing at the time the checks were so deposited that there were insufficient funds on deposit in the Skyproof Manufacturing, Inc. account at Metropolitan Bank to pay the checks.

7. It was a further part of the scheme to defraud that beginning on or about June 25, 1975, and continuing until on or about October 7, 1975, Carolyn S. Cummings and Harrison P. Cronic did cause to be deposited at Metropolitan Bank, Tampa, Florida, a series of checks, totaling $4,600,881.39, drawn by Carolyn S. Cummings on the Sky-

proof Manufacturing, Inc. account in Norman Bank of Commerce, Norman, Oklahoma, and would and did receive cash, bank obligations, and deposit credits from Metropolitan Bank, knowing at the times the checks were so deposited that there were insufficient funds on deposit in the Skyproof Manufacturing, Inc. account at said Norman Bank of Commerce to pay the checks.

8. And it was a further part of the scheme and artifice that Harrison P. Cronic, Carolyn S. Cummings, and Wylie C. Merritt, Jr., did deposit in the Skyproof Manufacturing, Inc. account at said Norman Bank of Commerce during the period June 23, 1975, to October 16, 1975, checks and wire transfers in the amount of $4,841,073.95, all drawn on the Skyproof Manufacturing, Inc. account at Metropolitan Bank, Tampa, Florida. They would and did represent to said Norman Bank of Commerce that there were sufficient funds in the Skyproof Manufacturing, Inc. account at said Metropolitan Bank to pay the checks previously drawn, as aforesaid, whereas in truth and in fact, as they then well knew, there would be and were at all times between the 23rd day of June, 1975, and the 16th day of October, 1975, insufficient funds on deposit to pay for the checks Harrison P. Cronic, Carolyn S. Cummings and Wylie C. Merritt, Jr. intended by such false and fraudulent representations and pretenses to deceive and defraud said Norman Bank of Commerce and to induce the bank to part with its funds and to convert and appropriate such funds to their own profit and use.

9. That on or about May 6, 1975, at Oklahoma City, Oklahoma County, Western Judicial District of Oklahoma, Harrison P. Cronic, Wylie C. Merritt, Jr., and Carolyn S. Cummings, for the purpose of executing the aforesaid scheme and artifice to defraud and to obtain money by means of false and fraudulent pretenses, representations and promises willfully and knowingly did cause to be deposited in an authorized mail depository, to be sent and delivered by the Postal Service of the United States, mail matter, according to the directions thereon, from Fidelity Bank N.A., Oklahoma City, Oklahoma, to Northern Chicago Trust Company, Chicago, Illinois, a letter containing the

following checks drawn on the Skyproof Manufacturing, Inc., account 00 777 3, in the Metropolitan Bank, Tampa, Florida, all in violation of Title 18, United States Code, Sections 1341 and 2:

Check No.	*Amount*	*Date*	*Payee*
1237	$865.10	May 2, 1975	Wylie C. Merritt, Jr., CPA
1238	$931.25	May 5, 1975	Wylie C. Merritt, Jr., CPA

COUNT II

The Grand Jury realleges all of the allegations of Count I of this Indictment except those contained in paragraph numbered nine thereof, and further charges:

That on or about May 14, 1975, at Oklahoma City, Oklahoma County, in the Western Judicial District of Oklahoma,

HARRISON P. CRONIC,
WYLIE C. MERRITT, JR., and
CAROLYN S. CUMMINGS

for the purpose of executing the aforesaid scheme and artifice to defraud and to obtain money by means of false and fraudulent pretenses, representations and promises, willfully and knowingly, according to the directions thereon, caused to be deposited in an authorized mail depository to be sent and delivered by the Postal Service of the United States, mail matter from Fidelity Bank N.A., Oklahoma City, Oklahoma, to Northern Chicago Trust Company, Chicago, Illinois, a letter containing the following checks drawn on the Skyproof Manufacturing Inc., account 00 777 3, in the Metropolitan Bank, Tampa, Florida, all in violation of Title 18, United States Code, Section 1341 and 2:

Check No.	*Amount*	*Date*	*Payee*
1239	$1,341.52	May 8, 1975	Wylie C. Merritt, Jr., CPA
1240	$1,698.27	May 10, 1975	Wylie C. Merritt, Jr., CPA

COUNT III

The Grand Jury realleges all of the allegations of Count I of this Indictment except those contained in paragraph numbered nine thereof, and further charges:

That on or about June 1, 1975, at Oklahoma City, Oklahoma County, in the Western Judicial District of Oklahoma,

HARRISON P. CRONIC
WYLIE C. MERRITT, JR., and
CAROLYN S. CUMMINGS

for the purpose of executing the aforesaid scheme and artifice to defraud and to obtain money by means of false and fraudulent pretenses, representations and promises, willfully and knowingly, according to the directions thereon, caused to be deposited in an authorized mail depository, to be sent and delivered by the Postal Service of the United States, mail matter from Fidelity Bank N.A., Oklahoma City, Oklahoma, to Northern Chicago Trust Company, Chicago, Illinois, a letter containing the following checks drawn on the Skyproof Manufacturing Inc., account 00 777 3, in the Metropolitan Bank, Tampa, Florida, all in violation of Title 18, United States Code, Sections 1341 and 2:

Check No.	*Amount*	*Date*	Payee
1306	$1,485.10	May 15, 1975	Wylie C. Merritt, Jr., CPA
1309	$1,847.69	May 15, 1975	Wylie C. Merritt, Jr., CPA

COUNT IV

The Grand Jury realleges all of the allegations of Count I of this Indictment except those contained in paragraph numbered nine thereof, and further charges:

That on or about June 23, 1975, at Oklahoma City, Oklahoma County, in the Western Judicial District of Oklahoma,

HARRISON P. CRONIC,
WYLIE C. MERRITT, JR., and
CAROLYN S. CUMMINGS

for the purpose of executing the aforesaid scheme and artifice to defraud and to obtain money by means of false and fraudulent pretenses, representations and promises, willfully and knowingly, according to the directions thereon, caused to be deposited in an authorized mail depository, to be sent and delivered by the Postal Service of the United States, mail matter from Fidelity Bank N.A., Oklahoma City, Oklahoma, to Northern Chicago Trust Company, Chicago, Illinois, a letter containing the following check drawn on the Skyproof Manufacturing Inc. account 00 777 3, in the

Metropolitan Bank, Tampa, Florida, all in violation of Title 18, United States Code, Sections 1341 and 2:

Check No.	*Amount*	*Date*	*Payee*
1552	$500.00	June 20, 1975	Skyproof Manufacturing, Inc. Material & Supply Division

COUNT V

The Grand Jury realleges all of the allegations of Count I of this Indictment except those contained in paragraph numbered nine thereof, and further charges:

That on or about July 2, 1975, at Oklahoma City, Oklahoma County, in the Western Judicial District of Oklahoma,

HARRISON P. CRONIC,
WYLIE C. MERRITT, JR., and
CAROLYN S. CUMMINGS

for the purpose of executing the aforesaid scheme and artifice to defraud and to obtain money by means of false and fraudulent pretenses, representations and promises, willfully and knowingly, according to the directions thereon, caused to be deposited in an authorized mail depository, to be sent and delivered by the Postal Service of the United States, mail matter from Fidelity Bank N.A., Oklahoma City, Oklahoma, to Northern Chicago Trust Company, Chicago, Illinois, a letter containing the following checks drawn on the Skyproof Manufacturing Inc. account 00 777 3, in the Metropolitan Bank, Tampa, Florida, all in violation of Title 18, United States Code, Sections 1341 and 2:

Check No.	*Amount*	*Date*	*Payee*
1153	$2,000.00	June 25, 1975	Skyproof Manufacturing, Inc. Material & Supply Division
1555	$2,600.00	June 27, 1975	Skyproof Manufacturing, Inc. Material & Supply Division
1556	$9,100.00	June 28, 1975	Skyproof Manufacturing, Inc. Material & Supply Division

COUNT VI

The Grand Jury realleges all of the allegations of Count I of this Indictment except those contained in paragraph numbered nine thereof, and further charges:

That on or about July 22, 1975, at Oklahoma City, Oklahoma County, in the Western Judicial District of Oklahoma,

HARRISON P. CRONIC,
WYLIE C. MERRITT, JR., and
CAROLYN S. CUMMINGS

for the purpose of executing the aforesaid scheme and artifice to defraud and to obtain money by means of false and fraudulent pretenses, representations and promises, willfully and knowingly, according to the directions thereon, caused to be deposited in an authorized mail depository, to be sent and delivered by the Postal Service of the United States, mail matter from Fidelity Bank N.A., Oklahoma City, Oklahoma, to Northern Chicago Trust Company, Chicago, Illinois, a letter containing the following checks drawn on the Skyproof Manufacturing Inc. account 00 777 3, in the Metropolitan Bank, Tampa, Florida, all in violation of Title 18, United States Code, Sections 1341 and 2:

Check No.	*Amount*	*Date*	*Payee*
1787	$10,100.21	July 19, 1975	Skyproof Manufacturing, Inc. Material & Supply Division
1788	$11,950.00	July 21, 1975	Skyproof Manufacturing, Inc. Material & Supply Division

COUNT VII

The Grand Jury realleges all of the allegations of Count I of this Indictment except those contained in paragraph numbered nine thereof, and further charges:

That on or about July 29, 1975, at Oklahoma City, Oklahoma County, in the Western Judicial District of Oklahoma,

HARRISON P. CRONIC,
WYLIE C. MERRITT, JR., and
CAROLYN S. CUMMINGS

for the purpose of executing the aforesaid scheme and artifice to defraud and to obtain money by means of false and fraudulent pretenses, representations and promises, willfully and knowingly, according to the directions thereon, caused to be deposited in an authorized mail depository, to be sent and delivered by the Postal Service of the United States, mail matter from Fidelity Bank N.A., Oklahoma City, Oklahoma, to Northern Chicago Trust Company, Chicago, Illinois, a letter containing the following checks drawn on the Skyproof Manufacturing Inc. account 00 777 3, in the Metropolitan Bank, Tampa, Florida, all in violation of Title 18, United States Code, Sections 1341 and 2:

Check No.	*Amount*	*Date*	*Payee*
1792	$19,986.50	July 24, 1975	Skyproof Manufacturing, Inc. Material & Supply Division
1793	$16,165.00	July 25, 1975	Skyproof Manufacturing, Inc. Material & Supply Division

COUNT VIII

The Grand Jury realleges all of the allegations of Count I of this Indictment except those contained in paragraph numbered nine thereof, and further charges:

That on or about July 29, 1975, at Oklahoma City, Oklahoma County, in the Western Judicial District of Oklahoma,

HARRISON P. CRONIC,
WYLIE C. MERRITT, JR., and
CAROLYN S. CUMMINGS

for the purpose of executing the aforesaid scheme and artifice to defraud and to obtain money by means of false and fraudulent pretenses, representations and promises, willfully and knowingly, according to the directions thereon, caused to be deposited in an authorized mail depository, to be sent and delivered by the Postal Service of the United States, mail matter from Fidelity Bank N.A., Oklahoma City, Oklahoma, to Northern Chicago Trust Company, Chicago, Illinois, a letter containing the following checks drawn on the Skyproof Manufacturing Inc. account 00 777 3, in the Metropolitan Bank, Tampa, Florida, all in violation of Title 18, United States Code, Sections 1341 and 2:

Check No.	*Amount*	*Date*	*Payee*
1795	$11,872.52	July 26, 1975	Skyproof Manufacturing, Inc. Material & Supply Division
1846	$19,150.00	July 28, 1975	Skyproof Manufacturing, Inc. Material & Supply Division
1847	$18,839.11	July 28, 1975	Skyproof Manufacturing, Inc. Material & Supply Division
1848	$16,900.00	July 29, 1975	Skyproof Manufacturing, Inc. Material & Supply Division

COUNT IX

The Grand Jury realleges all of the allegations of Count I of this Indictment except those contained in paragraph numbered nine thereof, and further charges:

That on or about August 12, 1975, at Oklahoma City, Oklahoma County, in the Western Judicial District of Oklahoma,

HARRISON P. CRONIC,
WYLIE C. MERRITT, JR., AND
CAROLYN S. CUMMINGS

for the purpose of executing the aforesaid scheme and artifice to defraud and to obtain money by means of false and fraudulent pretenses, representations and promises, willfully and knowingly, according to the directions thereon, caused to be deposited in an authorized mail depository, to be sent and delivered by the Postal Service of the United States, mail matter from Fidelity Bank N.A., Oklahoma City, Oklahoma, to Northern Chicago Trust Company, Chicago, Illinois, a letter containing the following checks drawn on the Skyproof Manufacturing Inc. account 00 777 3, in the Metropolitan Bank, Tampa, Florida, all in violation of Title 18, United States Code, Sections 1341 and 2:

Check No.	*Amount*	*Date*	*Payee*
1926	$ 9,820.80	August 8, 1975	Skyproof Manufacturing, Inc. Material & Supply Division
1927	$16,820.18	August 9, 1975	Skyproof Manufacturing, Inc. Material & Supply Division
1928	$ 8,905.30	August 8, 1975	Skyproof Manufacturing, Inc. Material & Supply Division
1929	$ 9,116.32	August 9, 1975	Skyproof Manufacturing, Inc. Material & Supply Division
1930	$ 7,793.87	August 11, 1975	Skyproof Manufacturing, Inc. Material & Supply Division

COUNT X

The Grand Jury realleges all of the allegations of Count I of this Indictment except those contained in paragraph numbered nine thereof, and further charges:

That on or about September 13, 1975, at Oklahoma City, Oklahoma County, in the Western Judicial District of Oklahoma,

HARRISON P. CRONIC,
WYLIE C. MERRITT, JR., and
CAROLYN S. CUMMINGS

for the purpose of executing the aforesaid scheme and artifice to defraud and to obtain money by means of false and fraudulent pretense, representations and promises, willfully and knowingly, according to the directions thereon, caused to be deposited in an authorized mail depository, to be sent and delivered by the Postal Service of the United States, mail matter from Fidelity Bank N.A., Oklahoma City, Oklahoma, to Northern Chicago Trust Company, Chicago, Illinois, a letter containing the following checks drawn on the Skyproof Manufacturing Inc. account 00 777 3, in the Metropolitan Bank, Tampa, Florida, all in violation of Title 18, United States Code, Sections 1341 and 2:

Check No.	*Amount*	Date	*Payee*
2147	$23,002.43	September 10, 1975	Skyproof Manufacturing, Inc. Material & Supply Division
2148	$24,129.45	September 11, 1975	Skyproof Manufacturing, Inc. Material & Supply Division
2149	$31,617.54	September 11, 1975	Skyproof Manufacturing, Inc. Material & Supply Division
2150	$26,413.27	September 11, 1975	Skyproof Manufacturing, Inc. Material & Supply Division
2151	$19,050.10	September 11, 1975	Skyproof Manufacturing, Inc. Material & Supply Division

COUNT XI

The Grand Jury realleges all of the allegations of Count I of this Indictment except those contained in paragraph numbered nine thereof, and further charges:

That on or about September 24, 1975, at Oklahoma City, Oklahoma, in the Western Judicial District of Oklahoma,

HARRISON P. CRONIC,
WYLIE C. MERRITT, JR., and
CAROLYN S. CUMMINGS

for the purpose of executing the aforesaid scheme and artifice to defraud and to obtain money by means of false and fraudulent pretenses, representations and promises, willfully and knowingly, according to the directions thereon, caused to be deposited in an authorized mail depository, to be sent and delivered by the Postal Service of the United States, mail matter from Fidelity Bank N.A., Oklahoma City, Oklahoma, to Northern Chicago Trust Company, Chicago, Illinois, a letter containing the following checks drawn on the Skyproof Manufacturing Inc. account 00 777 3, in the Metropolitan Bank, Tampa, Florida, all in violation of Title 18, United States Code, Sections 1341 and 2:

Check No.	*Amount*	*Date*	*Payee*
2325	$31,029.81	September 23, 1975	Skyproof Manufacturing, Inc. Material & Supply Division
2326	$ 565.75	September 23, 1975	Skyproof Manufacturing, Inc. Material & Supply Division
2351	$22,441.35	September 23, 1975	Skyproof Manufacturing, Inc. Material & Supply Division
2352	$ 7,271.04	September 23, 1975	Skyproof Manufacturing, Inc. Material & Supply Division
2356	$18,761.59	September 23, 1975	Skyproof Manufacturing, Inc. Material & Supply Division
2357	$14,323.65	September 23, 1975	Skyproof Manufacturing, Inc. Material & Supply Division
2361	$21,050.10	September 23, 1975	Skyproof Manufacturing, Inc. Material & Supply Division
2362	$17,545.89	September 23, 1975	Skyproof Manufacturing, Inc. Material & Supply Division

COUNT XII

The Grand Jury realleges all of the allegations of Count I of this Indictment except those contained in paragraph numbered nine thereof, and further charges:

That on or about October 2, 1975, at Oklahoma City, Oklahoma County, in the Western Judicial District of Oklahoma,

HARRISON P. CRONIC,
WYLIE C. MERRITT, JR., and
CAROLYN S. CUMMINGS

for the purpose of executing the aforesaid scheme and artifice to defraud and to obtain money by means of false and fraudulent pretenses, representations and promises, willfully and knowingly, according to the directions thereon, caused to be deposited in an authorized mail depository, to be sent and delivered by the Postal Service of the United States, mail matter from Fidelity Bank N.A., Oklahoma City, Oklahoma, to Northern Chicago Trust Company, Chicago, Illinois, a letter containing the following checks drawn on the Skyproof Manufacturing Inc. account 00 777 3, in the Metropolitan Bank, Tampa, Florida, all in violation of Title 18, United States Code, Sections 1341 and 2:

Check No.	*Amount*	*Date*	*Payee*
2378	$31,097.96	September 30, 1975	Skyproof Manufacturing, Inc. Material & Supply Division
2381	$27,629.55	October 1, 1975	Skyproof Manufacturing, Inc. Material & Supply Division
2401	$27,924.22	Octber 1, 1975	Skypoof Manufacturing, Inc. Material & Supply Division
2409	$29,754.68	October 1, 1975	Skyproof Manufacturing, Inc. Material & Supply Division
2415	$22,337.90	October 1, 1975	Skyproof Manufacturing, Inc. Material & Supply Division
2439	$32,353.65	October 1, 1975	Skyproof Manufacturing, Inc. Material & Supply Division

COUNT XIII

The Grand Jury realleges all of the allegations of Count I of this Indictment except those contained in paragraph numbered nine thereof, and further charges:

That on or about October 8, 1975, at Oklahoma City, Oklahoma County, in the Western Judicial District of Oklahoma,

HARRISON P. CRONIC,
WYLIE C. MERRITT, JR., and
CAROLYN S. CUMMINGS

for the purpose of executing the aforesaid scheme and to defraud and to obtain money by means of false and fraudulent pretenses, representations and promises, willfully and knowingly, according to the directions thereon, caused to be deposited in an authorized mail depository, to be sent and de-

livered by the Postal Service of the United States, mail matter from Fidelity Bank N.A., Oklahoma City, Oklahoma, to Northern Chicago Trust Company, Chicago, Illinois, a letter containing the following checks drawn on the Skyproof Manufacturing Inc. account 00 777 3, in the Metropolitan Bank, Tampa, Florida, all in violation of Title 18, United States Code, Sections 1341 and 2:

Check No.	*Amount*	*Date*	*Payee*
2437	$35,811.51	October 7, 1975	Skyproof Manufacturing, Inc. Material & Supply Division
2438	$33,658.37	October 7, 1975	Skyproof Manufacturing, Inc. Material & Supply Division
2440	$32,397.86	October 7, 1975	Skyproof Manufacturing, Inc. Material & Supply Division
2441	$31,883.12	October 7, 1975	Skyproof Manufacturing, Inc. Material & Supply Division
2442	$34,808.36	October 7, 1975	Skyproof Manufacturing, Inc. Material & Supply Division

A TRUE BILL:
FOREMAN OF THE GRAND JURY

LARRY D. PATTON
United States Attorney

ORIGINAL SIGNED BY:

JOHN E. GREEN
Assistant U.S. Attorney

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF OKLAHOMA

CR-80-21-E

United States of America, plaintiff,

v.

HARRISON P. CRONIC AND CAROLYN S. CUMMINGS,
DEFENDANTS.

MOTION TO WITHDRAW
HAD BEFORE THE HONORABLE LUTHER B. EUBANKS
ON JUNE 19, 1980
IN OKLAHOMA CITY, OKLAHOMA

APPEARANCES:

MR. CHARLES WATERS, Assistant United States District Attorney, Federal Building, Oklahoma City, Oklahoma, appearing on behalf of the government.

MR. CHRIS E. COLSTON, First National Building, Oklahoma City, Oklahoma, appearing on behalf of the Defendant, Cronic.

MR. ARNOLD D. LEVINE, Tampa, Florida, appearing on behalf of the Defendant Cummings.

* * *

[2] MR. LEVINE: Good morning, Your Honor. Arnold Levine.

THE COURT: Yes, Mr. Levine. Did you get through with your trial in Florida?

MR. LEVINE: Yes, we did. In fact, the Jury came in yesterday afternoon and I was able to get on a plane.

THE COURT: I see. All right. Well, Mr. Cronic has filed a response to your application to withdraw as you have seen involves sharp conflict, confactual contentions of the parties and I have got your response to his. I hardly know how to proceed here.

MR. LEVINE: If I may, I think I could advise Your Honor, either as an officer of the court or under oath, it's

immaterial to me, I initially met with both Mr. Cronic and Miss Cummings. Mr. Cronic retained me to represent the two of them and I asked them at that junction in the presence of one another whether or not they throught there was a conflict in my representation of them and they both stated to me at that time, no. But we were all three togetner. And predicated upon that, I appeared before the magistrate for the arraignment representing the two parties and entered pleas of not guilty for them.

Some several weeks ago, it's difficult for me to be [3] precise about the time. Well, let me go back historically. Mr. Cronic did not pay an agreed upon retained fee, I kept telling him that if he didn't, I would seek withdrawal. But I recognize as a former United States Attorney and practice primarily in federal court for 20 years that would be an inappropriate basis to file before the court and I never did. The matter I haven't got a nickel from him and I never filed the motion.

Some several weeks ago while I was in the midst of this federal criminal trial in Tampa, I met privately with Miss Cummings and her employer, Mr. T. J. Johnson. And at that point in time, she for the first time explained her role and her position in connection with the matters that gave rise to the charges. And as a result of that conversation, it became clear to me that the positions of the parties were absolutely inconsistent, absolutely inconsistent. And as soon thereafter I could being involved in the trial on a day to day basis, I prepared and filed the motion.

I represent to Your Honor that this motion has not been filed based on the failure of Mr. Cronic to pay me a fee, if that was the only predicate and the only problem, I would come here and represent him for nothing. I have done that on any number of occasions as a court-appointed attorney or for the fact that I failed to make appropriate arrangements with the client and get security. As an officer of this Court, I advise [4] Your Honor that one attorney cannot represent these two Defendants. Their positions are irreconcilable and Miss Cummings' defense as first advised to me in this private conversation that I told you about is absolutely incompatible with the positions of Mr. Cronic. And

there's no way that I could handle both of their representations.

THE COURT: Well, of course, the Court realizes those things happen. You did represent rather authoritatively to our magistrate that there would be no conflict in interest at the time of arraignment, but you say that has developed since then. Now, I think Mr.—who is—

THE COLSTON: I'm Chris Colston, Your Honor.

THE COURT: I'm sorry, I haven't met him. I found him on the alphabetical list of eligible lawyers and I appointed him to represent Mr. Cronic, but I haven't met him. I talked to him on the phone.

MR. LEVINE: Pardon me, Your Honor. In the context that is absolutely true what the transcript reflects and as I mentioned to Your Honor when I met the two parties together and Mrs. Cummings told me she was concerned about expressing her few at that point in time in the presence of Mr. Cronic and they both said that there's no problem and I had to rely upon that and that is the predicate why I made the representation to the magistrate.

THE COURT: It's ironic that the letter you wrote [5] him about the fee told him you were going to withdraw if he didn't pay it came about the time you found out you were—he attached that to his response here.

MR. LEVINE: Judge, early on, shortly after the arraignment, he didn't pay and I kept dunning him.

THE COURT: Oh, yes.

MR. LEVINE: Calling him. So the issue about nonpayment of fee was pregnant from the beginning and I waited and waited and waited and never did file that motion predicated upon that and that has nothing—

THE COURT: All right. You want to ask some questions now of the lawyer?

MR. CRONIC: Yes, sir, I have some.

THE COURT: Well, I guess you better be sworn then, Mr. Levine, take the witness stand and we will proceed with inquiry.

ARNOLD D. LEVINE,

having been first duly sworn, was examined and testified on his oath as follows:

THE COURT: Well, now, Mr. Cronic, are you going to do this yourself or are you going to have your lawyer do it? I appointed you a lawyer.

MR. CRONIC: Yes, sir. It was my understanding that this appointment was based on the end results of this hearing. That my attorney, Mr. Colston, would become effective after Mr. [6] Levine was or was not allowed—

THE COURT: Well, I'm sorry if you got that impression. I appointed him last week and made a written order and I intended everybody to get a copy of it. I don't know if you did or not. Did you get a copy of the order I entered?

MR. CRONIC: Yes, sir, I got a copy of it.

THE COURT: And it did as I viewed it contemplate maybe relieving Mr. Colston if Mr. Levine was retained. But go ahead, if that's your wish to handle interrogation personally, you may proceed.

THE CRONIC: Well, since Mr. Colston and I have not even discussed it with him—

THE COURT: Well, go ahead, let's proceed.

DIRECT EXAMINATION

BY MR. CRONIC:

Q Okay. I have here three additional—

THE COURT: Wait, sorry to interrupt. I think we should let the record show that the co-defendant last week and I don't believe it was on the record, it may have been, Carolyn Cummings indicated without stating a reason which I didn't require, indicated that she too believed that there is a conflict. That Mr. Levine should not represent both her and Mr. Cronic. If that was not made official in the record, it should be.

MR. LEVINE: Judge, she is here to reconfirm that.

[7] THE COURT: Yes. Go ahead.

MR. CRONIC: Your Honor, I have three additional letters here from Mr. Levine that I would like to give to you to make a copy of.

THE COURT: Well, let's wait and see—let him look at them and see if they are truly his letters and we will receive them properly.

MR. CRONIC: Fine.

THE COURT: Before I look at them.

Q (by Mr. Cronic) Here they are.

THE COURT: Let him look at them.

MR. LEVINE: I take it Your Honor would like for me to confirm if these are true or not.

THE COURT: Sure, I'm not going to look at them unless they're properly identified and received in evidence.

A There are three letters here, the first letter is dated March 7, 1980, and that letter is a letter that I wrote and has my signature.

There is a letter dated April 23rd, 1980, and that letter I wrote and contains my signature.

And a letter May 19, 1980, that I wrote and contains my signature.

THE COURT: All right. They will be received in evidence, such value as they may prove to be worth.

THE CRONIC: Your Honor, each one of the letters that [8] were just entered into the record are additional requests for sums of money concerning the defense of Cronic and Cummings indicated on the letters themselves. This is also in addition to the letters submitted in my brief to deny Mr. Levine's motion. That makes a letter dated March 7th, April the 2nd, April 23rd and May the 19th all requesting sums of money for defense of Cronic and Cummings.

Now, what Mr. Levine has said in his motion—

MR. LEVINE: Pardon me, Your Honor, I was under the impression he was going to ask me questions.

THE COURT: I think so.

MR. LEVINE: If he's going to argue the issues—

THE COURT: Right.

MR. LEVINE: —I think that's wholly inappropriate.

THE COURT: That is taken as an objection and sustained.

You go ahead. If you wish to argue, that will be done after the evidence is all in.

MR. CRONIC: All right.

I would like to ask Mr. Levine concerning the sums of money paid to him in the past and part of my motion that was filed with this Court, could he please explain to us what the total amount of $17,000.00 that was paid to his of-

fice was for between October the 16th, 1975, and June 25th, 1976.

A I represented the corporation, Skyproof, Incorporated, [9] Skyproof Manufacturing, in some civil matters. I represented—

Q Could you tell us what civil matters those were?

A Oh, at this juncture, I don't have any recall.

THE COURT: I think he attached that itemized statement, didn't he, to some—

A I think he did.

THE COURT: I think so. I got something here in the file that I recall having seen. Yes, here's a—well, wait, it may not be precise, but to save time I'll show you and you can see it here. Maybe this pertains to some of the things. This is an attachment to your earlier pleading in the case.

Now, go ahead, Mr. Cronic. If you want to look at it and see what he's look at there.

A Well, there's an Exhibit 2 that contains my signature. It's dated May 26th, 1978. You at some point in time requested that I account to you for the monies that were received and I indicated on this letter what that was. And as you will note, there was Internal Revenue Service matter which one of my partners went to Atlanta for—

Q (By Mr. Cronic) That was not during the time that I asked him the question concerning the funds.

A Oh, I'm sorry. What time did you ask about?

Q Between October 16th, 1975, and June 25, 1976.

The reason that this is important is that in your motion you have stated that no information was given to you [10] concerning Skyproof, that it was never discussed by me with you in any death whatsoever. If that is the case, I would like for you to tell us, please, for what purposes was this money—was this money given to you?

A Well, I can tell you specifically that it had nothing to do with your representation in connection with this criminal matter. Your position always was that you had not been involved in any fraud on any bank or anyone else in connection with Skyproof and the failure of that, Skyproof was attributable to the errors and failings of Mr. Merritt and to creditors who came down on you precipitously. And in con-

nection with the particular proceedings we learned early on that postal inspector Pugsley was investigating the matter. You said, you know, it's absurd, there's nothing about it. I had a couple of telephone conversations with Mr. Pugsley and he just said, well, we are investigating it. A subpoena duces tecum grand jury for some records that you turned over to me, corporate records, were in my office, Mr. Pugsley obtained them from me. And that is the sum total of the effort in any respect that I had insofar as Skyproof and the subject matter of this indictment which is Skyproof.

THE COURT: It is involved in this indictment before me?

A Yes, sir.

THE COURT: Skyproof? I didn't even—

[11] A Skyproof Manufacturing Company is the company involved.

THE COURT: All right.

A And if not all of the monies paid over the years, 95, 99 percent of the monies paid were related to representation unrelated to Skyproof except in one instance there was when Skyproof went out of business, there was a creditor somewhere out west, Georgia Pacific Company that owed Skyproof some money, I think it was in the neighborhood of some 40 odd thousand dollars and we collected that money and in turn transmitted a portion of it to your aunt, per your direction, since she was the named stockholder and retained the balance or the balance of the fee that was owed generally for other services rendered. But it was a collection matter as opposed to anything else. And I say Skyproof, it is conceivable that that company was Abraham Corporation, but unconnected with these proceedings, some corporate—involving a civil claim.

THE COURT: I think you have answered it.

Q (By Mr. Cronic) Yes, he answered it, but I would like to refresh Mr. Levine's memory. And that is that his statement concerning the transfer of funds from Georgia Pacific to my aunt had absolutely nothing to do with the Skyproof matter period. And that if his memory is failing him to that extent, that perhaps it's failing in additional areas. For the

simple reason that he's although given us a long explanation—

[12] MR. LEVINE: Judge, is he asking me a question? I object to—

THE COURT: Yes. Let's don't argue it until we get the evidence in, Mr. Cronic.

Q (By Mr. Cronic) Well, you still haven't answered my question. If I gave you $17,000.00 and you say it was for other things not to do with Skyproof, will you tell us what it was for?

A Well, in the first place, I don't know—

THE COURT: Wait, hold it, hold it just a moment. The young lady—

MISS CUMMINGS: I would like to say something, Your Honor. The first $13,000.00 in that letter I personally gave Mr. Levine. Now, they were corporate checks—

THE COURT: Well, here—

MISS CUMMINGS: And Mr. Cronic wasn't even involved.

THE COURT: Here, listen, listen, let me—I'm going to shut this hearing down. I'm not going to resolve the personal fuss between you. I don't think I'm called upon to do it, but I can see that there is indeed a conflict here. And what I am not going to allow to happen and I want you to understand that I think that I'm doing my duty, one in protecting your interest too and very intertwined, I'm not going to let the District Attorney sit here and grab any crumbs that might fall off of this personal fight to use against both of you [13] down the line. And I'm just going to, I may have to, after the trial is over, conduct a further hearing, I hope not, but I'm going to grant the application to withdraw of Mr. Levine. I have already appointed a lawyer to represent you. That is a final order. I'm not going to let this fight—it will likely get into areas that you may not realize may come back to haunt you next week when we start the criminal trial, both the young lady and you, Mr. Cronic.

MR. CRONIC: Your Honor, may I make a statement then?

THE COURT: Yes, you may.

MR. CRONIC: One other point that we failed to address here since the hearing has been stopped and one that was one of the reasons I was attempting to get to the point of the money paid to Mr. Levine and that is that Mr. Levine has stated that no client/attorney privilege information was imported to him under any circumstances whatsoever. I maintain that that is a complete lie. That the records will show that Mr. Levine's vagueness and attitude will reflect that and therefore information given to him during a five-year investigation can now be used against me.

THE COURT: Well, let me say that I'm not saying yes or no with respect to that. I find beyond any question that there is conflict right here and even hostility between you and the young lady, the co-defendant, between you and the lawyer and it's just inconsistent that he continue to be your lawyer in [14] view of that personal animosity. You see, what could happen down the line, you lose your case, you're going to accuse him of throwing in the towel because of his hostility, all kinds of implications can arise. And I'm sorry I have to shut down the hearing, but I don't think I have got any choice in my opinion. In so doing, let's be sure that I'm not ruling on which one of your statements is necessarily the truth. I'm just saying that I am persuaded beyond the purview of a doubt that there is a conflict between you and animosity between you and the co-defendant and it's impossible for anybody to proceed to try to represent both of you.

Now, go ahead, step down, that's the end of the hearing. I'm going to enter the order now.

I have got this case scheduled for trial next Monday. I wish that all of you could hang around until say, oh, around 2:00 o'clock this afternoon. What's happening, we don't have any member of the press here do we? Anything I say is public but I don't want this to be divulged to the news media, I hear that there's a good possibility that many of the defendants, maybe even most of the defendants in the next case, the Levine case, not this Levine, a local druggist accused of violating his license and wholesaling without prescription narcotics, that he might plead guilty. If so, that might change my plans. I at first told John Green yes-

terday we likely would not start this case until Monday week, I believe the 30th of [15] June. So let's talk about the actual commencement date this afternoon after we see whether or not there's going to be a plea in that case. I frankly kind of doubt it. I frankly believe it will go to trial, at least with respect to some of them, I believe there's five defendants.

MR. CRONIC: May I ask a question?

THE COURT: And that if so would permit me to continue that tentative date of the 30th of June.

Yes, you may.

MR. CRONIC: Two things here, Your Honor. One is I don't feel like that I could possibly get a fair defense giving my attorney one or two weeks to prepare for this when Mr. Levine has had the advantage of a five-year investigation, all the documentations, a complete review of all of that prior to my testimony before a federal grand jury in Tampa.

THE COURT: Here's the thing the Court's been confronted with, this case has been postponed a long time as it is.

MR. CRONIC: But that's not due to my fault, Your Honor.

THE COURT: Well, it was postponed under the application of Mr. Levine here that he's representing each of you and was engaged in trial in Florida. I thought about that and that's one of the reasons why I may just keep that June 30th as a firm date anyhow to give your lawyer that much more [16] time. And I am aware of the problem there and let's speak to that after we know what's going to happen in the 1:30 case. Would you be here at 2:00 o'clock then and I will—

MR. CRONIC: I will be here anytime.

THE COURT: All right, If all of you will report back to, not necessarily for a full hearing, but just to know what is going on in that case which will then allow me to be more specific on when we might start the actual trial of this one. All right. You may be excused then, all of you, until say 2:00.

MR. COLSTON: May I ask one question? I came prepared today as the appointed Counsel to ask for a continuance. May I present my motion for continuance?

THE COURT: Go ahead and leave it with the Clerk and let me read it and then I may want you to enlarge upon it later on.

MR. COLSTON: Very well.

THE COURT: Have you already filed it with the Clerk?

MR. COLSTON: No, I have not.

THE COURT: Why don't you do that.

(Whereupon, a recess was had.)

THE COURT: All right. Now, looking for Mr. Colton, the lawyer we appointed. Oh, here he is, I'm sorry, I didn't see.

John Green, is he here?

[17] MR. WATERS: Your Honor, he won't be in until tomorrow. I did talk to John last night about this case and his personal belief is that he has no objection to this continuance and request on a legal basis.

THE COURT: I think he might go stronger than that. He talked to one of my law clerks and as I understand, he kind of indicated that he thought it ought to be set over for a while. Let me ask some questions here. You have seen, I guess, that the drug conspiracy trial has just gone off. Every single defendant pled guilty and, you know, when I talked to you this morning I thought we might agree to get to your trial sooner than originally predicted, but I'm now inclined may be to even put it off a little more in view of what I head. Would there be any objection on the part of Cummings if we say postpone it another week?

MR. LEVINE: No, Your Honor.

THE COURT: It was scheduled to start Monday and then we tentatively decided on June 30. Now, then, we may be talking about still another week. Would there be any—

MR. LEVINE: So far as Miss Cummings is concerned, she would waive her right to a speedy trial and there would be no objection. Although insofar as I'm concerned, I would be prepared to go whenever Your Honor would schedule the matter. If you're going to be continuing the matter we

spoke about the prospect of a date of the week of July the 15th, but I don't [18] know what Your Honor's—

THE COURT: Well, let me ask—

MR. LEVINE: —calendar is in that regard. If I may be of some assistance to the Court, since I have been in the case for a good while the Counsel's just coming in, the documentation that the government has and has made available for examination, literally speaking, is at least a foot and a half high if not two feet high, that is the government's documentation in this case. And Counsel for Mr. Cronic has not as yet had an opportunity to see it no less digested. It constitutes hundred and hundreds of checks and thousands of entries and some of the witnesses in the matter are witnesses from Florida, from the Tampa community, and some witnesses are local here.

I would respectfully submit to Your Honor that if Counsel for Mr. Cronic were to devote all of his working days, he might be able to be ready in 30 days, might be, if he were to devote all of his time just to this case.

THE COURT: I'm sure he's going to be beholden to me for selecting him. Of course, he was taken off the alphabetical lit, I haven't met the gentleman before I talked to him on the phone and I am grateful to you for accepting this assignment.

I don't have your application before me, is there a time frame mentioned in it?

[19] MR. COLSTON: No, Your Honor. I would respectfully request a minimum of 30 days. I did have the opportunity yesterday, Mr. Green cleared me to at least view the files at the postal inspector's office. And Counsel does not misstate the facts, it is at least one and a half feet—

THE COURT: Well, let me cut you a few days short there. I'm going to grant this, despite the fact the case has been delayed a great deal beyond this, but, it's not your fault. Our July docket starts on the 14th of July, that's just a couple of days short, so why don't we set it firm, firm setting to start Monday, July 14th.

MR. LEVINE: Judge, might I ask in that respect if your Honor would consider Tuesday the 15th. I'm lecturing in a criminal seminar that's been scheduled for several months.

THE COURT: I'm sorry, I just can't do that. See, all our Jurors are already summoned to come in that 14th and I'm sorry. Let's just fix it firm at that time and you will have to plow around and get somebody else to lecture for you or postpone it.

MR. WATERS: I think that's a good decision, Judge. The 14th, the government will be ready and I think that gives enough time—

THE COURT: Let's alert all of you now to get your dockets cleared so that there will be no conflict with any of you to be here and ready to go to trial on that morning at 9:30.

[20] MR. WATERS: And as far as the discovery matters, I want the record to reflect I talked to Mr. Pugsley just no later than about an hour ago and Mr. Pugsley is ready to meet with you at your convenience and provide all the documentation and discovery that the rules permit and certainly more than the rules permit, I'm sure.

THE COURT: Well, while you fellows are so agreeable all around here, why don't you go in and have a little short conference and then come out here for a longer one and work this thing out by either a dismissal or plea bargain or something.

MR. WATERS: Well, Your Honor, I might just say for the record that although this is not my case, as the Court knows, I have been in some discussions on that matter at least with Mr. Levine regarding his client and I think that Mr. Levine would say that when Mr. green gets back in town tomorrow—

THE COURT: You say there's a possibility?

MR. WATERS: —there is some possibility.

THE COURT: The Jury is not here. Well, good.

MR. WATERS: We may be able to work something out. At least I've talked to Mr. Pugsley who's the case agent and we have initiated some discussion in that regard at least as it relates to the Defendant Cummings.

THE COURT: Now, it's a fair statement to put into this record the motion is granted at the request of the Defendant Cronic, not objected to by the co-defendant, as a [21]

matter of fact, Mr. Levine on her behalf specifically waived her speedy right—speedy trial right, and Counsel for the government not only does not object, but acquiesces in the postponement because of the volume of work necessary to get ready. All right.

MR. COLSTON: Your Honor, may I inquire of the Court, is this setting of a trial date impair my rights in any way to file motions in terms of hiring an investigative assistant?

THE COURT: Oh, wait a minute. No, no, no. I'm going to grant you the right to file motions like that. I don't believe I'm going to open it for you to file the regular other motions, motion to suppress or that sort of thing. But, yes, sir. And, incidentally, if you haven't already done so, you should sign an Affidavit in Forma Pauperus, you told me a week or so ago you would have no problem.

DEFENDANT CRONIC: Correct.

THE COURT: So that he can get paid and then you intend to file a motion maybe for the help of an investigator?

MR. CRONIC: Yes, sir.

THE COURT: Get it in as quick as you can and try to select your own, somebody that you got confidence in. There is one man I wouldn't appoint under any circumstances, privately I will tell you who it is and I have known him for a long time and he's not honest. So, I wouldn't appoint him.

[22] MR. COLSTON: I think my most pressing assistance needed right now would be of an accountant. I believe the government saw fit to hire two and I am certain that Mr.—

THE COURT: I wouldn't hesitate to grant it. Unfortunately, though, as you may not know, Mr. Levine likely does, $300.00 is the most we can pay and that doesn't get much accounting but it's better than none, I guess.

MR. LEVINE: Judge, for the record, on behalf of both defendants, I have filed not only the usual but some unusual pre-trial motions.

THE COURT: Right, and Judge Daugherty ruled on all of those.

MR. LEVINE: Yes, he has. And I don't know of any motion that was not filed on behalf of all the defendants.

THE COURT: Well, I'm not opening it up. Now, I appoint this man and it is an imposition, I know it is, somebody's got to do it and grateful for you for doing it. I will help you to that extent, get you some investigative aid but not open it up, you know, for all the motions. I'm grateful that Mr. Levine—Levine or Levine?

MR. LEVINE: I call myself Levine.

THE COURT: Well, the other gentleman spelled his like yours but he wants to be called Levine.

MR. LEVINE: Levine.

THE COURT: All right. Certainly he will help you [23] in any way he can and the Court is grateful. And, yes, I'll look for the application to appoint an investigator and promise you that I will grant it. I do reserve the right to reject this one person that I will tell you the name and probably you wouldn't want to select him anyhow, but otherwise just kind of leave it to your discretion who to appoint and we will do that forthwith.

MR. CRONIC: Your Honor, may I ask a question? I have spoken with my court-appointed Counsel here, he's been most helpful. However, I would like to bring up one point. His specialty is real estate law, he's only tried—has been involved with one federal criminal case in his entire legal experience. The American Bar Association presently recognizes a hundred and fifty-eight specialists under the—

THE COURT: If you're getting around to saying you want to select your own lawyer, no way. You have got a good lawyer and if you want your own, you go hire your own. This man was appointed under our system. We select qualified lawyers, he's qualified or I wouldn't have appointed him. He's very bright and he was appointed from an alphabetical list of all of whom are screened and we just don't do it any other way in this District. So you—

MR. CRONIC: That is denied.

THE COURT: —if you're getting around—it absolutely is.

[24] MR. CRONIC: Yes.

THE COURT: If you're wanting more lawyers, you've got a good one as it is.

MR. WATERS: Thank you, Your Honor.

THE COURT: All right.

* * *

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF OKLAHOMA

Case No. CRF-80-21-E

UNITED STATES OF AMERICA, PLANITIFF

v.

HARRISON P. CRONIC, DEFENDANT.

**TRANSCRIPT OF PROCEEDINGS
HAD BEFORE THE HONORABLE LUTHER B. EUBANKS
IN OKLAHOMA CITY, OKLAHOMA
ON JULY 14, 15, 16, AND 17, 1980**

APPEARANCES:

MR. JOHN GREEN, Assistant United States District Attorney, Federal Building, Oklahoma City, Oklahoma, appearing on behalf of the plaintiff.

MESSRS. CHRIS E. COLSTON and RYLAND L. RIVAS, First National Building, Oklahoma City, Oklahoma, appearing on behalf of the Defendant.

* * *

[87] THE COURT: All right. The Defendant may reserve it until the government has rested or make it now. Which do you prefer, Mr. Colston?

MR. COLSTON: We'll make our statement now.

THE COURT: Make it now. Go right ahead. You may make the opening statement for the Defendant. This is Mr. Colston and I introduce him to you this morning. Go ahead.

MR. COLSTON: Ladies and gentlemen of the Jury, you have heard Mr. Green state that the government has alleged a corporation known as Skyproof Manufacturing was a sham, a fraud and a pretense. We will prove to you with the government's own witnesses that that allegation is totally false. With the government's witnesses. The government's alleged a conspiracy between three defendants. They say this conspiracy was to defraud banks. They further state that at the time of this alleged conspiracy, the defendants could not cover overdrafts, that they didn't

have the intent to cover overdrafts. I will prove to you my client could have covered overdrafts but since he wasn't involved, why ask for the money? Therefore, he had no intention to defraud anyone.

I think you will find that after you hear the evidence, the only reason there were overdrafts it's a combination of either greed or incompetence on the Norman Bank of Commerce, a shambles of record systems at Skyproof which Miss [88] Cummings kept.

The proof will show that Norman Bank of Commerce went along with these overdrafts if not weeks at least days. I think the evidence may show months. The proof will show that they went along with these overdrafts because the account was so good, they're making money off of it. It's one of the best customers. And in a five-month period nearly $5,000,000.00 in good funds went through that account. You don't run that business off.

I think the proof will show that the funds we're talking about are so large that the overdrafts are going to be compared to say $500.00 account with $50.00 overdraft. That's how much money was in that account.

Now, the proof is going to show that Harrison Cronic had more than sufficient funds or access to sufficient funds to cover those drafts. That's important. He could have done it. Why? He wasn't involved.

The proof is going to show that he had no connection with the ownership of Skyproof. He couldn't have written a check on that account if he wanted to. Every check is going to be signed by Miss Cummings or Mr. Wylie Merritt. Not only could he not write a check on that account with no ownership position, wasn't a stockholder, wasn't an officer, he couldn't force anybody to do anything.

Now, the government is going to try to show that Mr. [89] Cronic controls Skyproof Corporation. And I think you're going to hear some government witnesses that are going to testify to that effect. But listen to what they say, what they say they believed back then and then look at what they did when it came down to do business with Skyproof. They didn't want Mr. Cronic's signature, they wanted Mrs. Cummings. He could negotiate all he wanted,

he was an operations officer, he should be able to, but his negotiations were totally worthless until he went to the officers of Skyproof, Carolyn Cummings, and got those documents signed.

Now, the government's going to show or try to show that the three defendants set up bank accounts that they all assigned or controlled. We're going to prove to you that Mr. Cronic didn't touch those accounts. Therefore, how did he assign them? How did he control them?

There's going to be testimony or at least allegation that Mr. Cronic somehow mystically controlled Carolyn Cummings. But I want you to look at the evidence when you get to the crucial point of this case, Harrison Cronic was trying to advise her. She totally ignored him, did the opposite of what he advised. She sold the corporation. Is that control?

I think when we get through here, I will have shown that there was no real crime committed. Due to the size of this account, the Norman Bank of Commerce was doing nothing [90] more than making loans really. When it got too big they immediately got security, not from my client Mr. Cronic, but from Skyproof and Miss Cummings individually. Didn't even talk to Mr. Cronic about signing on the line. Why? He didn't own it. He didn't control it.

The evidence will show that the Norman Bank of Commerce either knew or they should have known from the time of the first overdraft but they kept going along with it, they went along with it. When they got scared, when it got too big for them, they got security. And they're going to have to admit to you that they're secured on paper because you're going to see it. You're going to see a note. Where is it going to come from? My client, Mr. Cronic? No. It's going to come from Skyproof Manufacturing. Another corporation you will hear about is Paris Processing, which was wholly owned subsidiary. They had to sign the note, Carolyn Cummings signed the note individually. Did they come to my client? No. Then they're going to have the nerve to sit here and tell you that they knew Mr. Cronic was the true power and owner.

I want to remind you again that the evidence that Mr. Green's alluded to you already will show approximately $5,000,000.00 of good funds went through this account in five months. Norman Bank of Commerce will have to tell you that they don't have very many customers like that. They need to keep them. They will tell you that they're able to loan [91] against a certain portion of that money.

Now, as I stated earlier, there is an allegation of conspiracy here. The evidence will show that there was a Telex machine installed at Skyproof plant, there was a Telex machine installed in Paris, Texas, at Paris Processing, there was a Telex machine set up across the hall from Mr. Wylie Merritt in the office of an employee whom Mr. Merritt hired. Why, if there is a conspiracy, why do you bring in outsiders?

Now, again, the government would harp on the fact and try to prove that Skyproof was not a going business. We will show you that once Skyproof was purchased by Carolyn Cummings, then is when it went to the number one in the State of Florida in the manufacture of mobile home trusses, not the other way around, as you previously heard.

The Norman Bank of Commerce is going to be screaming that it was a sham corporation. But when you hear the testimony from the government's witnesses, the Norman Bank of Commerce president, the attorney from the Norman Bank of Commerce who is a very very fine attorney, you're going to see that the best aspect of Skyproof Manufacturing known as Paris Processing has been owned by the Norman Bank of Commerce or some of its Board of Directors for five years.

MR. GREEN: Just a moment. The Counsel is geting into argument instead of statements now. I object to it.

[92] THE COURT: Oh, it's borderline, but he's outlining what he's expecting to prove. Go ahead, Counsel.

MR. COLSTON: Now, you're going to hear Mr. Cronic's name tossed around here a great deal. Not one document will you see has his name on it. Not one. So when people say we believe he was in control, listen to them, that is your obligation and look what they did. The truth of the matter is the Norman Bank of Commerce, its president, its

attorney, will be forced by me to testify that Mr. Cronic has never owned that plant, otherwise they owed him the money for the last five years.

I appreciate your attention. I apologize if I had to read from notes, but this is my first trial and I hope you will just bear with me.

Thank you.

THE COURT: Thank you. All right. Mr. Green, call your first witness for the government.

MR. GREEN: Mr. Kuwitsky.

VERNON KUWITSKY,

having been first duly sworn, was examined and testified on his oath as follows:

DIRECT EXAMINATION

BY MR. GREEN:

Q Would you state your name to the Court, please?

A Vernon Kuwitsky.

[93] Q And where do you reside?

THE COURT: Keep your voice up a little, it must carry to Defense table and back there. Go ahead, sir.

A 424 Sundown Drive, Norman, Oklahoma.

Q (By Mr. Green) And, Mr. Kuwitsky, what is your profession or occupation before you retired?

A I was a banker.

Q Which bank were you connected with?

A First National Bank & Trust Company, Norman.

Q How long were you with The First National Bank & Trust Company?

A Thirty-one years.

Q And is the First National Bank of Norman located in Norman, Oklahoma?

A Yes, sir.

* * *

[96] MR. GREEN: Your Honor, we would like to offer government's Exhibit 1-A and 1-B.

THE COURT: No objection is heard, they will be received.

* * *

[103] A Well, it was pretty clear that they were kiting between Norman and Tampa, Florida.

Q What is kiting in banking terms?

A Kiting is where you draw an item on one bank and deposit it on another all at the same time, reversing the operations. and it works pretty smooth until one item reaches the bank ahead of the deposit, then it has a tendency to back up. When checks start returning, it will generally end up overdrawing one account or the other and that happened in our bank on two different occasions until I talked to Mr. Wylie and told him we couldn't handle items like that anymore.

THE COURT: Mr. Witness, that's common talk for you. You see it every day or did and it's kind of foreign to us. Could you be more explicit, maybe put it on the board up there, this kiting?

A Kiting, well, like this deposit was made at our bank with checks drawn on the Tampa, Florida bank. I'm sure at that time or in a day or two a similar deposit was made in Tampa, Florida, maybe not the same amounts, but at the same time drawn on us. Well, when the checks from Tampa reach us, if enough good money is on deposit, the item is paid and everything is fine. And the same thing is true if it reaches Tampa and good money is on deposit. But if one account or another doesn't have enough money in it, then one of those checks is going to return. Now, the thing about a kiting [104] operation is they had the use of the money and what we call in banking terms, float, these items are floating between our bank and the Tampa, Florida, and back again. Well, the time it takes a check from Norman to Tampa and back is a week or ten days. Now, a lot of things can happen in a week or ten days with a bank account. We call that kiting.

Q (By Mr. Green) Does this particular kiting create an inflated balance in a particular bank?

A Well, it creates an untrue balance because it's not collected funds. Banks have a habit on good accounts of giving credit to the customer at the time he makes the deposit when actually the bank doesn't receive the money until the items you deposit have cleared. And as long as a bonafide

operation, it's all right, because the bank will get credit for it in a day or two. But when we clear this item on a bank in Oklahoma City, we're not getting immediate credit for it until they get some money.

* * *

[105] MR. GREEN: You may cross examine. Excuse me, I have one more.

When you have such credit funds in their account, from this check kiting you have described, would those be considered as good solid funds, sir?

A No, sir.

MR. GREEN: You may cross examine.

THE COURT: Go ahead, Mr. Colston, cross examine.

CROSS EXAMINATION

BY MR. COLSTON:

Q Mr. Kuwitsky, you have indicated that you talked with Wylie Merritt, is that correct?

A That's right.

Q On how many occasions?

A Well, twice that I know of. First time at the short I called him in and asked him to cover the overdraft, which he did. Now, I don't know what he deposited that time, he just ran it through the teller's window.

The second time it happened, I checked it a little closer and called him over and told him that we couldn't handle those items anymore, that we would have to handle them [106] as collection items.

Q All right. Did you ever talk with Carolyn Cummings?

A Who?

Q Carolyn Cummings.

A No, sir.

Q Do you know who that is?

A I do now.

Q All right. Is she the one who signed those checks from Skyproof?

A Yes, sir.

Q Did you ever talk with Harrison Cronic?

A No, sir.

Q Did he sign any of those checks in front of you?

A No, sir, not that I know of.

* * *

[134] MR. GREEN: Mr. Briscoe.

WILLIAM L. BRISCOE,

having been first duly sworn, was examined and testified on his oath as follows:

DIRECT EXAMINATION

BY MR. GREEN:

Q Would you state your name to the Court and Jury, please?

A William L. Briscoe.

Q Mr. Briscoe, by whom are you employed?

A Executive Courier Service, Inc.

Q How long have you been there?

A Approximately a year and six months or so.

Q And where were you employed before you went to work for Executive?

A Fidelity Bank.

Q Fidelity Bank? Is that located in Oklahoma City?

A In Oklahoma City.

Q How long were you with Fidelity?

A Approximately nine to ten years, about ten years.

* * *

[148] CROSS EXAMINATION

BY MR. COLSTON:

Q Mr. Briscoe, would you tell me again what your title was at Fidelity Bank?

A Vice President/Director of Data Preparation?

Q All right. Some of those exhibits in front of you are signed by A. D. Dunn, are they not?

A Yes, sir.

Q Who is A. D. Dunn?

A Well, I'm sure I don't know the person individual, but the postal department person that picks up the particular parcel is the person that signs that.

Q Have you signed any of these receipts anywhere?

A No, sir.

Q Who was W. L. Countz?

A Who?

[149] Q W. L. Countz.

A He would be the person from the postal department that picked it up.

Q Did you open each envelope or pouch and see what was in it?

A No, sir.

Q Did you ever open a pouch to see if these checks were in any of them?

A No, sir. Now, these were checks that we were sending out so we would have packaged them up.

Q Did you ever personally see those checks go in the pouches?

A No, sir.

Q Did I hear you say there were times when Fidelity Bank did not use express mail?

A Yes, sir.

Q You never saw those checks go in pouches, did you?

A I never saw these checks go into pouches.

Q You haven't signed these documents anywhere, have you?

A No, sir, I have not.

Q Has anyone at Fidelity Bank signed these documents?

A No, sir.

Q You cannot sit there personally and tell me you know those checks were in pouches, can you?

[150] A No, I cannot.

MR. COLSTON: No further questions, Your Honor.

* * *

[167] HAROLD L. HEIPLE,

having been first duly sworn, was examined and testified on his oath as follows:

DIRECT EXAMINATION

BY MR. GREEN:

Q Would you state your name for the Court and Jury, please?

A My name is Harold Heiple.

Q And, Mr. Heiple, by whom or what is your occupation or profession?

A I'm an attorney at law and I practice in Norman, Oklahoma.

Q How long have you been practicing law in Norman, Oklahoma, Mr. Heiple?

A I have been practicing in Norman since 1962.

Q And do you have any connection official with the Norman Bank of Commerce?

A Yes, sir, I was the organizers of the bank and I am the bank's lawyer and I'm also on the Board of Directors of the bank.

* * *

[171] Q All right. What, if anything, did Mr. Cronic then do after opening that particular meeting with a prayer in the lobby of the Marriott Hotel?

A In the course of the prayer, he made reference to financial requirements and needs of all the parties and when he finished the prayer, I said, "Mr. Cronic, what I'm interested in, is where is the Norman Bank of Commerce's half million dollars?" And in the course of the conversation, he represented to Mr. Bumgarner and to me that he really didn't know where it [172] could be, but certainly it could be accounted for because his company, Skyproof Manufacturing, was a very prosperous and very active company. And he made the statement, he said, I have got over half a million dollars in paid assets and that someway, whatever happened, they would find out and certainly make it good.

Q Did he ever make it good to this day?

A No, sir.

Q All right. Was there any other conversation—getting back to the Marriott Hotel lobby there in Dallas near I-35 and North Dallas.

A The rest of the conversation was consumed with Bumgarner and I trying to find out something about Skyproof Manufacturing and Mr. Cronic from him and from Mr. Merritt and what we got was a lot of conversation which was filled with glowing statements by Mr. Cronic about the

condition of the company and his own personal net worth and how he promised that nothing would happen and nobody would suffer a loss and nobody had stolen anything, or done anything wrong.

At that point in time, because we were in Dallas, Texas, and didn't have access to the books, there was not anymore we could really do. The meeting broke up with the promise that Cronic and Merritt would make every effort to ascertain what had caused this problem and see that—locate the money and make sure that there was no loss to anyone.

* * *

[174] Q All right, sir. And did you ever in your investigation as the attorney for the Norman Bank of Commerce, have any figure as to the amount of the loss involved in this experience with Skyproof?

A It was approximately half a million dollars.

Q All right, sir. And what was the condition of the bank after this particular incident?

A Well, the bank was hanging on by its fingernails. It was only because we were able to convince the banking authorities who were there with us on a daily basis who we had immediately called in and advised of the bank's condition that we were able to keep the bank open. Because the capital [175] structure of the bank at that time was only a million and two hundred thousand. And—but it was with the concurrence of the regulatory authorities, both FDIC and the people from the Oklahoma State Banking Commission that we were able to keep the door open. But it was frankly for a period of two to three weeks very questionable about whether or not they were going to put a padlock on the door.

Q All right, sir. Now, did you ever at any—you stated that you did not see Mr. Cronic anymore after you met him that day in Texas, October 12th, 1975?

A That's correct.

Q All right. Until you saw him, of course, in here today?

A Yes, sir.

Q All right, sir. Now, with reference to the matter of the Skyproof Manufacturing Company and the losses that

were associated with it, did the—did you have any hand or have any experience or of any type of security to try to lessen or recoup some of your losses there at the bank?

A Yes, sir. I went to Tampa, Florida, in about the 22nd of October, about ten days after we had this meeting in Dallas and I made contact there with Carolyn Cummings who at that time was holding herself out to be the president of Skyproof Manufacturing and an attorney named Arnold Levine. I went to the plant of Skyproof which was located outside of [176] Tampa and I was there with this premise, saying to these people what I want is money, what we're trying to do is save this bank, I don't really care about anything else, but I'm trying to recover the money and save this bank. We started negotiations. I went down with the hope of coming back with a mortgage on any and all assets that I could lay my hands on. I did not come back with anything. However, as a result of the negotiations that were started, we kept going and in November of that year, we got a mortgaged signed on virtually everything they claimed to have, which included a bottling plant in Paris, Texas, and this Skyproof Manufacturing Company down in Florida, an automobile and the various personal properties, equipment, that was there. IT was to secure what had been figured out as the ultimate loss that the bank had sustained. And if I recall correctly, Mr. Bumgarner can give you the figures exactly, I believe it was $484,000.00, approximately. Now, this was the amount of the note and mortgage that we got. And that note and mortgage was signed by Skyproof Manufacturing and by Paris Processing, Incorporated, a corporation that claimed to have title to the bottling plant and by Carolyn Cummings, individual. It was not signed by Mr. Cronic.

* * *

[178] Q All right. Did the Norman Bank of Commerce ever take over the operations of the Paris Bottling works?

A What the Norman Bank of Commerce did was when I found out that that day, I got on the telephone and I called Bob Bumgarner, the bank president in Norman and I said, there is an emergency down here, they're bleeding and stripping this thing, you got to throw out the directors and

the officers of the bottling plant immediately. So based on my advice, the bank had acquired the right to vote the stock, the corporate stock of Paris Processing, Inc., which was a corporation that owned this bottling company. Based on my advice, we convened a special meeting of shareholders of Paris Processing and at that point we threw out the Board of Directors of Paris Processing which consisted of Carolyn Cummings, I don't remember whether Mr. Cronic was listed as a director or not, but other employees of their Florida operations. And Carolyn Cummings happened to call and we elected three independent directors. Now, these were not bank people who were elected as directors, the three people who were elected directors were residents of Norman, Oklahoma. They were Don Stover who is a CPA, Bob Dill, who had been the attorney originally involved when Mr. Cronic acquired the bottling plant down there and Joe Langford, another lawyer. So we put these three—we voted these three people in as directors of the bottling plant which gave them technical control of it and they tried to run the bottling plant [179] for a period of time pursuant to this note and mortgage which we had taken from them in November. And out of the 480 something dollars on the mortgage, I think a total of $9,000.00 may have been paid. The bank's records will reflect any exact amount.

So finally in March of 1977, the bank had no choice and the bank examiners, we had to foreclose on that note and mortgage on the bottling plant in Texas. Which we did. And the bank, even though it had originally taken a 480 something thousand dollar note signed by Carolyn Cummings and Skyproof and Paris Processing, the bank examiners had forced all of that to be charged off immediately except $170,000.00, that is the only amount they would allow to be retained, even though we had a note and mortgage on the bottling plant and supposedly the Skyproof Manufacturing Company plant in Paris and a couple of automobiles.

* * *

[188] [CROSS EXAMINATION]

Q Mr. Heiple, I hand you what has been marked as Defendant's Exhibit 1. Would you tell us the date of execution, please?

A Yeah, it's dated November 28th, 1975.

Q So we're talking six weeks later then of your first [189] belief?

A Yes, sir.

Q Would you tell the Jury who the maker of that note is?

A Maker of the note is Skyproof Manufacturing, Incorporated, a corporation, signed by two officers and also Paris Processing, Inc., a corporation, signed by two officers and also Carolyn Cummings, individually.

Q Does the name of Harrison Cronic appear on that note?

A No, sir, it does not.

Q Did you prepare the mortgage also?

A Yes, sir.

Q Would it be reasonable to assume that it was made the same way?

A Sure it would be.

Q So who were the mortgagors?

A Pardon?

Q Who were the mortgagors?

A Skyproof Manufacturing, Inc., a corporation and Paris Processing, Inc., a corporation, and Carolyn Cummings, individually.

Q Did the name Harrison Cronic appear as a mortgagor?

A No, sir, not anyplace either in this note or in the records of property owned that we were trying to get.

[190] MR. COLSTON: Your Honor, I object, that's not responsive to my question.

Q (By Mr. Colston) Would you tell the Jury, please, what maker of the note means?

A Maker of the note is the person who signs the note who is one or more of the persons who promises to pay the debt that is declared to be due.

Q I believe you indicated Skyproof Manufacturing was one of the makers?

A That is right.

Q Who signed on behalf of Skyproof?

A Carolyn Cummings as president and Betty Allan signed it as secretary.

Q I believe you indicated that Paris Processing was one of the makers of the note. Can you tell us who signed for Paris Processing?

A Carolyn Cummings signed as president and Betty Allan as secretary.

Q I believe you indicated there was an individual.

A That's right, Carolyn Cummings individually.

Q And a mortgage is given as security for the note, is it not?

A That is correct.

[191] Q If there is a default in the note, the holder of the mortgage has something to go back on, do they not?

A If the security is worth anyting.

Q Okay.

A And if they're first.

Q You put the amount in the note, did you not?

A The amount that the bank was out in its loss, that is the amount of—that's how the amount of the note was arrived at.

* * *

[194] Q All right. Did at any time the Norman Bank of Commerce receive the voting rights to the stock in Paris Processing, Inc.?

A Yes. when the note and mortgage were given to them in the mortgage of November of 1975.

Q Was Paris Processing, Inc., a wholly owned subsidiary of Skyproof?

A Yes, sir.

Q Who executed the transfer of the voting rights?

A Well, they were contained in the mortgage which was signed by, among others, Carolyn Cummings and Betty Allan of the corporate officers of Skyproof Manufacturing.

Q Did Harrison Cronic execute that transfer?

A No. Harrison Cronic's signature isn't on anything.

Q Did Carolyn Cummings execute that in her individual capacity or corporate capacity or both?

A Well, she executed it in her individual capacity and Skyproof Manufacturing executed it and she signed a corporate officer of Skyproof.

Q Did you have any reason to doubt she was president of Skyproof?

A Not to doubt that she was president of Skyproof, I certainly doubted that she was—

MR. COLSTON: Your Honor, I object, that's not [195] responsive.

THE COURT: Well, he's going beyond, he's answered the question.

Q (By Mr. Colston) So Mr. Cronic has not executed the note, he didn't execute the mortgage, didn't execute the stock transfer, is that right?

A He didn't have to.

Q Is that correct?

A Is what correct, now?

Q Is the question—

THE COURT: Yes, it is repititious. He didn't sign anything. That's already clear, Counsel.

Q (By Mr. Colston) You didn't feel he had an interest to be divested, did you?

A Why, I knew he was in control of the thing, there wasn't any doubt about that. You don't have to be the president or director in order to control what a corporation does.

Q As a part of the stock transfer process that you as an attorney for Norman Bank of Commerce require a resolution of the stockholders or the board of directors of Paris Processing?

A Not of the stockholders of Paris Processing, no.

Q Board of Directors?

A No, sir. No, we had ascertained we were getting all that we could get and we had to take what we could get or have the bank examiner say come up with the dollars.

[196] Q Did you as attorney for Norman Bank of Commerce require a resolution from the Board of Directors and stockholders of Skyproof for the stock transfer?

A No, sir. It was contained in the mortgage.

Q Did the Board of Directors sign that mortgage?

A No, no, the Board—did the Board of Directors sign the mortgage? Carolyn Cummings signed the mortgage as member of the—in her capacity that she was a member of the Board of Directors as well as president.

Q Was she the only member of the Board?

A No, she would not have been the only member of the Board.

Q Was she the only stockholder?

A Of what?

Q Skyproof.

A Carolyn Cummings was the only one whose name was listed according to them as a shareholder of Skyproof.

Q Is she the only one who executed the stock transfer?

A There wasn't any stock transfer, it was all contained in the mortgage.

Q So any power that went with the stock was in that mortgage?

A That's right.

Q And that was just voting rights, is that right?

A The mortgage is about as broad and inclusive as I [197] could draw one, it gives us everything from soup to nuts.

Q If you have the voting rights on stock, you in essence control that stock, don't you?

A If we had the voting rights?

Q If you just—

A Whoever—

Q —as a theoretical question—

A Whoever controls voting rights obviously controls stock, certainly.

• • •

[200] Q (By Mr. Colston) Mr. Heiple, to the extent possible, we just try to pick up where we left off yesterday.

A All right, sir.

Q Who owned prior to November 28, 1975, the stock of Skyproof?

A Prior to November of '78?

Q '75.

A '75? If I recall correctly and I never examined the records, but according to what information I had I believe that all of the stock of Skyproof was issued in the name of Carolyn [201] Cummings. I never saw all of that stock, so I cannot verify it.

Q Yes, sir. Isn't it true that the stockholders of the corporation elect the Board of Directors?

A That's correct, sir.

Q Isn't it true that Harrison Cronic was not a member of the Board of Directors of Skyproof?

A I believe that is true.

Q Isn't it also true that as long as one person owned all the stock of the corporation that one person can do anything with the corporation that person wants?

A Yes.

* * *

[202] Q Would you tell the jury when the first payment was to be made on that note?

A Well, it's expressed in the terms of the note. It was to be paid in twelve separate and semi-annual installments, the first one was due on June 1, 1976.

* * *

[203] Q —is that correct? Isn't it true that Carolyn Cummings and Skyproof set in exactly the same position as the Norman Bank of Commerce did with reference to Paris Processing?

A I don't think so.

Q She owned all the stock, didn't she?

A No, I don't believe that she did. Her name was the listed stock—the only one listed as the stock owner. I [204] believe Mr. Cronic was in fact the true beneficial owner of the stock.

Q Who was on the stock certificate?

A Miss Cummings was the only one on the stock certificate.

Q Who transferred the voting rights to—

A Miss Cummings was the only one who signed all the papers involved. Mr. Cronic's name, signature does not appear anywhere.

* * *

[227] JAMES L. WILLIAMS

having been first duly sworn, was examined and testified on his oath as follows:

DIRECT EXAMINATION

BY MR. GREEN

Q State your name to the Court and Jury please.

A James L. Williams.

Q Mr. Williams, by whom are you employed?

A Metropolitan Bank and Trust Company in Tampa, Florida.

Q And in what capacity are you employed with the Metropolitan Bank & Trust Company of Tampa, Florida?

A I'm vice president in charge of branch coordination which includes all the operations of the branches.

* * *

[235] Q How did you become concerned or involved in this?

A Somewhere in mid-to late September, again, I had just been employed by the bank for a short period of time, I had a general meeting with all of our people involved in operations, including our bookkeepers, tellers, and proof department. And one of the things that we or that I particularly covered at this meeting was how they individually could be alerted for the type of transactions which in banking is referred to as kiting, how that could be detected in the various departments. So as if that should ever occur, so that we would catch it and our bank would not lose any money. If there is a kiting or I should say if there is an overdraft or an overdraft created by a check returned to

your bank by another bank and charged back to your customer's account, there is no insurance on that, it's absolute loss and has to be written off.

Q All right.

A And early in October, in fact, October the 6th to be explicit, '75, one of the people in our bookkeeping department brought me a transactions that day consisting of checks—I'm sorry, deposits being made to the Skyproof Manufacturing account, 00773 as well as all of the checks that we had in our bank file at that point and in effect, queried me as to whether or not this might be a kiting scheme.

Q What was your opinion after that?

A My immediate opinion was that it definitely was and [236] I immediately began returning all of the checks that we had in the bank to secure our position.

Q And when you say you returned all the checks, to whom did you return these checks?

A We returned the checks that were to the bank of last deposit.

Q Which would have been the Norman Bank of Commerce?

A Well, there were—there may have been other checks in there that were payable to other people. Again, I don't—I would have to look through these to see what might be in there. But there were a number of checks that went back eventually to the Norman Bank of Commerce. We returned them to the Federal Reserve Bank in Jacksonville since that was the way we had received them for payment.

* * *

[256] CROSS EXAMINATION

BY MR. COLSTON:

Q Mr. Williams, you have a large volume of checks in front of you there, do you not?

A That is correct.

Q Would you just thumb through there and satisfy yourself who signed each and every check?

A For the entire group?

Q Just thumb through and see if you see anything different.

THE COURT: To save time, I believe it's agreed that they're all signed by Carolyn Cummings, isn't that right?

MR. GREEN: Yes, we stipulate that they're all signed—

THE COURT: That's the point you want to make, I'm sure.

A I make the comment that they're not all signed by Carolyn Cummings. There are facsimile signatures that are a facsimile of Carolyn Cummings signature.

Q (By Mr. Colston) All right, sir.

A I do not know whether she applied that facsimile signature.

Q You have talked this morning about a contract resolution, have you not?

A That is correct.

[257] Q Do you have that with you?

THE COURT: Maybe the Clerk has it here.

MR. COLSTON: It's not been offered into evidence.

MR. GREEN: No, sir, we haven't offered it.

A I'm sorry, Your Honor, I don't.

THE COURT: Do you find it there, Mr. Green?

A MR. GREEN. I gave you copies of those, I believe, last night as well.

Wait, I'm sorry, I have them.

Q (By Mr. Colston) I have handed you what has been marked as Defendant's Exhibit 3, have I not?

A That is correct.

Q Would you identify that for the Court, please?

A This is the contractual resolution between the Skyproof Manufacturing Incorporated, Account No. 007765, which is not as being the payroll account which account was opened on April 22nd, 1975, in the initial deposit of $50,000.00.

Q Does it show an authorized signature?

A Yes, sir, it does.

Q Who is that?

A Carolyn S. Cummings, president.

Q Thank you.

A Would it be pertinent to describe the reverse side which is the articles of resolutions by the Board of Directors?

Q Please do.

[258] A This was a resolution of the Board of Directors of Skyproof Manufacturing passed on April 14th, 1975, authorizing one signature signing on the account. The secretary was a Larry V., as in Victor, Howell, Carolyn S. Cummings signed as certifying the foregoing as a correct copy of a resolution adopted at that meeting.

Q I have handed you what is marked as Defendant's Exhibit 4. Would you identify that for us, please?

A This again is a contractual resolution between Skyproof Manufacturing, Incorporated, and Metropolitan Bank of checking account No. 007773 with the authorized signer being Carolyn S. Cummings, president. Reflecting the account opened on April 22nd, 1975, with initial deposit of $50.00.

A resolution was passed at the Board Meeting of Skyproof Manufacturing on April 14th, 1975, authorizing one person to sign on the account, signed by Larry V. Howell, secretary, certification by Carolyn S. Cummings as a director.

Q Do the signatures on those authorizations appear to match those on the checks?

A Yes, they do.

Q You mentioned a letter here this morning, have you not, from Skyproof dated October 10, 1975?

A Requesting money to be transferred to Norman Bank of Commerce?

Q Yes, sir, I believe it referred to as government's [259] Exhibit 46?

A Yes, I have that in front of me.

Q Would you teli us who signed that letter, please?

A Carolyn S. Cummings.

Q Is her official capacity shown on that letter?

A Yes, it's denoted as president.

Q That you. Does your bank normally make a wire transfer of funds unless those funds are on deposit in your bank?

A We do not now. I might mention that we did at that point in time.

Q You just let anybody send a wire and not check it?

A Again, after my employment, we do not. There were wire transfers made against this account which were made against uncollected funds.

Q Okay.

A Prior to my employment.

Q Did you tell—

A I can give you the specific information on those if you need them.

Q Did you tell the Court and Jury earlier today that you had never met Harrison Cronic?

A That is correct.

Q In fact, you had never heard his name until this investigation?

[260] A That is not true.

Q When did you first hear it?

A Several employees of the bank indicated that from what they had understood from conversation with Carolyn Cummings that he was, I gather at that point in time, her boyfriend, and that he was also involved in the company.

Q Okay. But when you were going through those various checks and deposit slips, did I detect that the greatest sums were in the latter August, September, October period?

A I think that would be correct.

* * *

[261] CAROLYN RIDGEWAY,

having been first duly worn, was examined and testified on her oath as follows:

DIRECT EXAMINATION

Q Would you state your name to the Court and Jury, please?

A Carolyn Ridgeway.

Q And, Miss Ridgeway, by whom are you employed?

A Currently I'm employed by Doyle's Electric in Norman.

[262] Q How long have you been employed by Doyle Electric?

A Since April 15th of this year.

Q Where were you employed before you were with Doyle Electric?

A United Bank of Norman from October 29th of '79 to April 15th.

Q And where were you employed before the united Bank?

A For O.G.&E.

Q Excuse me. Have you ever worked for the Norman Bank of Commerce?

A Yes, sir, I worked for Norman Bank of Commerce from April 1st of '65, to July 30th of 1976.

Q April 1st of what year; '66?

A '66, yes, I'm sorry.

Q To July 1st of '70—

A '6. Ten years.

Q And what was your title or position with the Norman Bank of Commerce at that time?

A Well, from the beginning of my employment until September of '72, I was just in the operations department. But in September of '72 to the time that I left, I was the cashier at the bank in charge of operations.

Q And as the cashier in charge of operations, did you have custody and control of the records of the Norman Bank [263] of Commerce?

A Yes, I did.

Q All right. You were the cashier of the Norman Bank of Commerce in Norman, Oklahoma, during the months of March through October, 1975?

A Yes.

Q Are you familiar with an account at the bank at the time by the name of Skyproof Manufacturing Company, Inc.?

A Yes, sir.

Q And how did you become familiar with that particular account?

A The first time that I knew anything about the account was through our overdraft list. A check was pre-

sented for payment on the account and there was not enough funds in the bank to cover it.

Q When was that overdraft presented to you, do you recall approximately what month it was?

A Probably in July or August, not too long after the account was opened.

Q All right. And what did you do after that, what, if anything, did you do when the account appeared on your overdraft list?

A Well, at first I thought it was connected with another account that we had there at the bank that did several building projects and they had several accounts that started with Sky, [264] you know. And when I went to check the signature card, the name on the card was Carolyn Cummings and that was not a name that was familiar to me. So I went to the file to see what information we had on the new account.

And I saw that it was a company in Florida and that it had been opened by Wylie Merritt, CPA in Norman. And so I called him about the overdraft and I asked him why a company in Florida was banking in Norman. And, he said, that the company was going to be branching out in other areas and that he was going to be the accountant for the company in Norman, was where he was located and so they were going to have the central offices in Norman.

Q All right. Did Mr. Merritt give you any assurance about the overdcraft would be covered, or what as the extent of that?

A Yes.

* * *

[285] CROSS EXAMINATION

Q Okay. Is it not true that you called Carolyn Cummings on July 9, 1975?

A About her account being insufficient? I don't know if I called her or if she called me. I just know that I received a wire transfer.

Q Did you at that time advise her that the account was overdrawn?

A That it was insufficient, yes, sir.

Q Did she not in fact tell you to call Mr. Merritt?

A I don't know if she told me to on that specific time. At some point during our conversations while the account was open, she did tell me Mr. Merritt was handling their deposits and withdrawals.

Q You have visited with inspector Pugsley in this matter, have you not?

A Yes, sir.

Q If his records were to indicate that you called on July 9, 1975, would that be accurate them?

A Uh-huh.

Q Okay. Did you ever talk with Harrison Cronic?

A No, sir.

Q Did you ever attempt to talk with Harrison Cronic?

A I didn't know anything about Mr. Cronic until after [286] the kite was discovered.

Q So that so far as you personally are concerned any time there was problems with this account, you talked with either Carolyn Cummings or Wylie Merritt?

A Yes, sir.

Q Do you have the signature card there for the Skyproof account?

A Yes.

Q I have handed you what has been marked Defendant's Exhibit 5. Would you identify that for us, please?

A That is the signature card that the bank requires when a new account is opened and under the name of Skyproof Manufacturing and it's signed by Carolyn S. Cummings.

Q Does it show her official capacity?

A On the appropriate resolution it shows that she's the president.

Q Does it show anyone else having signature authority?

A No, sir.

MR. COLSTON: At this time Defendant would offer into evidence Defendant's Exhibit 5.

MR. GREEN: No objections.

THE COURT: Thank you. It will be received.

* * *

[289] Q All right. In order for a bank to make a loan, it must have funds on deposit, must it not?

A Yes.

Q In other words, the amount of money it can lend is tied to the amount of deposits?

A Yes.

Q So that the greater deposits the bank has on file the greater the lending capacity?

A Yes, sir.

Q I believe you told us that the first overdraft was July 9th or July 7th, if I'm mistaken, is that correct?

A Yes.

Q Could you just take us through the next 30 days and [290] so on and show us the overdrafts or at least tell us about them.

A Okay. Our—at this time when this happened, the bank was not open on Saturdays, we were open on Friday from like 9:00 to 3:00 as that day and then from 4:00 o'clock to 7:00 o'clock that Friday evening would be our Saturday, so there can be two dates there. It's hard to explain to you but like this check—I don't have a calendar in front of me back in 1975, so I'm assuming this check on the 7th was either a Thursday or a Friday.

Q May I interrupt for a moment?

A Okay.

Q Would it shorten things to say that it is true that these insufficient funds checks occurred time and time again?

A No, sir, they—not that they kicked out for us to recognize. In the month of July, they were insufficient on the 7th and the 8th. A wire transfer came in on the 9th for $27,250.00 that was more than enough to cover them.

The next time they showed insufficient funds was July 25th. And they had a check come in for $21,000.00. Let me make sure that that amount is right. And they made a wire transfer for $20,000.00. Okay.

The check that was on the 24th of July was for $18,761.00. And they showed a current balance of $13,730.00 and they made a $20,000.00 deposit to cover it. [291] And then in—it doesn't look like they were reported insufficient at all in September.

Let's look at August. On August 6th, let's see, wait, August 1st and 5th and 6th and then 19th and 20th.

Q So you already—

A The one on the 6th she—we were wire transfered $28,500.00; the one on the 19th there were deposits that were made at a window that covered them and then August the 20th they were insufficient and we received a $75,000.00 wire transfer.

Q So you have pointed out at lest seven or eight occasions there, have you not, where they were—

A Let's see, one, two, three, four, five, six, seven, eight.

Q Time span of 30 to 45 days in there, isn't there?

A July 9th to August 20th.

Q The truth is, the bank didn't want to stop an account that was running a million dollars a month through its bank, did it?

A I don't know. I can tell you that Mr. Merritt's standing in the community had a lot to do with this being able—well,—

[292] Q What I'm getting at, if you close this account that's running through a million dollars a month, the bank loses a million dollars a month lending capacity, does it not?

A I wasn't in on the loan end of it. I don't really know that much about loans. And I know there is a loan to deposit ratio that examiners go by as far as your lending limits and everything, but I didn't have that much to do with loans, very little.

* * *

[298] Call your next.

MR. GREEN: Logan Browning.

Q Would you state your name to the Court, please?

A Logan D. Browning.

Q And, Mr. Browning, where are you from?

A Tampa, Florida.

Q What is your profession?

A Certified Public Accountant.

Q You are a Certified Public Accountant in the state of Florida?

A Yes, sir.

Q Mr. Browning, did you have occasion to perform an audit or accounting work on the books and records of Skyproof Manufacturing Company of Tampa, Florida?

A Yes, sir. It was not an audit by definition, but it was accounting work review summaries, that type thing.

* * *

[301] CROSS EXAMINATION

BY MR. COLSTON:

Q Mr. Browning, did you ever talk with Carolyn Cummings about doing accounting work for Skyproof?

A On some occasions, yes.

Q On more than one occasion?

A I would say maybe two or three different times.

Q Okay. Did you do some personal accounting work or [302] tax work for Mr. Cronic?

A Yes, sir, I did.

Q But for the Skyproof account you were paid by Skyproof funds?

A As I recall, yes.

Q Miss Cummings executed the check?

A Right.

MR. COLSTON: No further questions.

MR. GREEN: May this witness be excused to return to Florida?

THE COURT: Yes, he may be excused from further attendance at the trial.

Call your next witness.

Do you intend to offer the document, Mr. Green, before this witness leaves?

MR. RIVAS: Well, we would have to object to it, we want to look it over.

THE COURT: You would have no objection to its identification?

MR. RIVAS: No.

MR. COLSTON: That's correct.

THE COURT: He's identified it then. All right. If either side wants to offer it, it will be received.

Thank you, sir. You may be excused.

[303] **ROY MYHR,**

having been first duly sworn, was examined and testified on his oath as follows:

DIRECT EXAMINATION

BY MR. GREEN:

Q Would you state your name to the Court and Jury, please?

A Yes, sir, it is Roy Myhr.

Q Spell your name M-y-h-r?

A Yes, sir.

Q Where do you live, Mr. Myhr?

A Lakeland, Florida.

Q And what kind of a business are you in in Lakeland, Florida?

A Right now I'm a salesman for the Ewell Concrete Pipe Company.

Q Were you ever so associated with the firm called the Imperial Lumber Company of Bartow, Florida?

A Yes, sir, I was.

Q When were you associated with the Imperial Lumber Company of Bartow, Mr. Myhr?

A From 1967 until July, 1975.

[311] **CROSS EXAMINATION**

Q Was there an employment agreement?

A There was an employment agreement and he said, yes, he wanted—he wanted to hire me to come to work for him because I knew the lumber business, yes.

Q Was anything committed to writing?

A We had talked about it, charted out things on paper, yes. I don't recall having a contract, but there may be a contract but I don't recall right now.

Q If there was a contract out there, Skyproof would have to execute that contract, wouldn't they?

A Yes, sir.

Q Harrison Cronic couldn't execute it, could he?

A Well, I don't know. He was the one that told me when I wouldn't give him the $5,000.00 to make up the $20,000,00, "You will not come to work for me."

Q I believe you indicated that you gave the money to Miss Cummings, didn't you?

A No, sir, I did not. I gave it to Harrison Cronic and he turned it over to Carolyn.

Q Oh, he didn't keep it personally?

A He turned it over for her to deposit. Now, how they deposited it, I have no idea.

Q Just passed right through his hands, did it?

A That's your words, sir. I don't know.

Q Is that not what you're telling the Court?

[312] A I told the Court I believe that I handed it to Mr. Cronic.

Q Who in turn handed it to Miss Cummings, is that right?

A Yes, sir.

Q If Skyproof Manufacturing wasn't a going business, why would you want to have worked for them?

A At that time, looked like they were a going business, yes, and that's what I said.

Q What is this time now?

A Pardon?

Q What time are we talking about?

A This is in March of '75.

Q You were willing to give up the job that you had had for eight years to go to work for Skyproof?

A Would you repeat that, sir?

Q Was the job with Skyproof sufficiently good that you were willing to give up the job you had for eight years?

A Yes, sir. It was—he promised me a lot more money than I was making at the time.

Q You in fact toured the plant of Skyproof, didn't you?

A Oh, certainly. I did that actually before I sold him the lumber.

Q Can you describe that plant to us, please?

A The plant was actually, when it first started, was [313] one fair sized building where they were manufacturing the trusses for the mobile homes.

Q When it first started, is that implied that there was something else?

A No, sir.

Q Did they expand?

A Other than just a little biddy ofice that he had alongside. Yes, he expanded to another building right next to him. He got another building shortly thereafter.

Q Are you saying that there were two expansions or one?

A Sir, so far as I know, he just got one other building. I do not know this, his business.

Q Can you tell us approximately when this expansion occurred?

A Yes, he acquired the other building sometime in '75, sometime prior to January—or July, I'm sorry, '75.

Q When you were at Imperial and sold products to Skyproof, could just anyone there in the yard sign receipts for them?

A This, I don't know what he had, I'm sorry. He did call in orders at the lumber yard and have—that I wasn't aware of. Of course, you know, he could order from not just me but from any salesman that was over there.

* * *

[314] **WILLIAM R. DILL,**

having been first duly sworn, was examined and testified on his oath as follows:

[315] **DIRECT EXAMINATION**

BY MR. GREEN:

Q State your name to the Court, please.

A William R. Dill.

Q Mr. Dill, what is your profession?

A I'm an attorney, I office in Norman, Oklahoma.

Q And how long have you been an attorney in Norman, Oklahoma, Mr. Dill?

A Approximately seven years.

Q And were you practicing law in Norman, Oklahoma, during the period from approximately March, 1975, through the end of March, 1975?

A Yes, sir. I was there continuously during 1975.

Q And were you associated with Mr. Swinsford—Mr. Lankford, excuse me.

A Mr. Lankford, yes, sir.

Q You were known as Lankford and Dill at that time?

A Yes, sir.

Q And during the course of your practicing law with Mr. Lankford, did you have occasion to have an estate in which a 7-Up and RC Bottling plant in Paris, Texas, was in that estate?

A Yes, that was the estate of one Mr. Will Abbott.

Q All right, sir. During the course of while you were handling and probating this estate, did you have occasion to [316] talk with one Harrison P. Cronic concerning the sale of this bottling company in that estate?

A Yes, sir, I did.

* * *

[321] CROSS EXAMINATION

Q It's not unsual procedure for an operations or business manager to go out and negotiate, is it?

A It's not my recollection that Mr. Cronic ever represented himself to be an operations or business manager.

Q Did he ever represent himself to be the president of Skyproof Manufacturing Company?

A No, sir, he did not. In fact, I believe Miss Cummings was probably the president of the business.

Q Isn't it true that you never asked Miss Cummings about his authority to act?

A I asked Mr. Cronic about his authority to act on behalf of this corporation, yes, sir.

I realize that is not directly responsive to your [322] question, but I'm not certain that I ever had any direct communication with Miss Cummings relative to that.

Q At some point, you became convinced that he had the authority to negotiate, but you also equally became convinced that he didn't have the authority to execute the instruments, isn't that correct?

A No, sir, that's not entirely correct. But I believe that you're pushing me very close to an area that I probably would not be able to testify to and I would want to confer with Counsel first.

* * *

[324] **BARBARA J. HOLMES,**

having been first duly sworn, was examined and testified on her oath as follows:

DIRECT EXAMINATION

Q Would you state your name to the Court and Jury, please?

A Barbara Holmes.

Q Ms. Holmes, where do you live? What city?

[325] A Norman, Oklahoma.

Q And were you living in Norman, Oklahoma, during the year of 1975?

A Yes.

Q And by whom were you employed in 1975?

A I was employed by Skyproof Manufacturing.

* * *

[333] **CROSS EXAMINATION**

BY MR. COLSTON:

Q Mrs. Holmes, are you saying that at some point Mr. Cronic told you that he was your boss?

A I don't remember the exact conversation, sir, but I definitely had that impression.

[334] Q Did that come from a conversation with Mr. Cronic?

A It came—he was in the office for several days and—

Q Was that in connection with the purchase of Paris Processing?

A Yes.

Q Did you ever have occasion to ask Carolyn Cummings whether or not you should obey Mr. Cronic?

A I never even questioned that anyone else was the boss.

Q Even though he never signed any checks? She signed your payroll checks?

A She signed all the checks.

Q Didn't that imply that she had some authority someplace?

A I felt that she had some authority, but I didn't feel that she was the boss.

Q Did you know that she was the president of the corporation?

A Yes.

Q How much higher can you go?

A Well, to me a president is a figurehead.

Q President of the United States is a figurehead?

A In a way.

Q President of General Motors is a figurehead?

[335] A Who has the controlling interest in the stock?

Q Who did own the stock?

A I don't know.

Q Did you have more than one occasion with Carolyn Cummings or one occasions to talk with her on the telephone?

A I talked with her daily on the telephone.

Q Never missed a day?

A I may have, but I don't remember missing a day.

Q In those conversations did she give you the check number, the amount and the payee on the check?

A Yes.

Q And I believe you testified you kept a log of these checks?

A Yes.

Q I believe also you testified that you returned those to Miss Cummings, didn't you?

A I returned this list to her.

Q You indicated you were hired by Mr. Wylie Merritt?

A Yes.

[339] BERNARD J. SCHAFSTALL,

having been first duly sworn, was examined and testified on his oath as follows:

DIRECT EXAMINATION

BY MR. GREEN:

Q Would you state your name to the Court and Jury, please?

[340] A Bernard J. Schafstall.

Q Mr. Schafstall, where do you reside?

A 720 Northeast 32nd Street, Paris, Texas.

Q And what is your business or occupation in Paris, Texas?

A I'm the general manager of Har-Mar Bottling Company.

Q What kind of products does your company produce?

A Royal Crown, 7-Up and Nehi flavors.

Q How long have you been associated with the 7-Up, RC, Nehi plant there in Paris?

A Approximately four and a half years.

Q Where did you live before you were associated with the company in Paris, Texas?

A I lived in Lake Wells, Florida.

Q And by whom were you employed in Lake Wells, Florida?

A I was employed by Skyproof Manufacturing.

Q And when did you first start your employment with them, Skyproof?

A In approximately March of '73, 1973.

Q And who was it that employed you with Skyproof?

A Harrison P. Cronic.

* * *

[347] Q So the amount of volume of work that you put out there in the plant, what would be the average monthly volume in dollars of work that you would put out there at the Skyproof Company?

A Just guessing, approximately $30,000.00 a month.

* * *

[349] Q How many employees did you have there, sir, approximately?

A Approximately 20.

MR. GREEN: You may cross examine.

CROSS EXAMINATION

BY MR. COLSTON:

Q Mr. Schafstall, when Skyproof Manufacturing bought the Paris Bottling Plant, could you describe for the Court what the condition of that plant was?

A It was in poor condition.

Q Isn't it a fact that if ownership had not changed hands, the Texas Health Authorities were going to close it?

A Yes, sir, that's what I was told.

Q With that change of ownership, you were given some [350] additional time to get it cleaned up, weren't you?

A Yes, sir.

Q That plant has never been closed down, has it?

A No, sir.

Q Prior to Skyproof purchasing that bottling plant, were you employed at the bottling plant?

A No, sir.

Q It was Skyproof who put you in there?

A Yes, sir.

Q I believe you testified that you remained there today, is that correct?

A Yes, sir.

* * *

Q Who owns it now?

A Fellow by the name of Lee Martin and Bill Harrison.

Q Do you know the business name they operate under?

A The name of the corporation?

Q Yes.

[351] A Har-Mar Bottling.

Q Assuming there's just been one change of ownership, you have been basically in charge of that plant for the last four and a half years?

A Yes, sir.

* * *

[353] A No, sir.

CROSS EXAMINATION

Q When Skyproof brought the bottling plant, isn't it true that you went to St. Louis on behalf of the company?

A Yes, sir.

[354] Q And what was the nature of that meeting?

A To send a corporate representative to St. Louis to secure the franchises.

Q Is that the headquarters of the 7-Up company?

A St. Louis, yes, sir.

Q Did you have to advise 7-Up people who the owner of Paris Processing was going to be?

A They already knew that Carolyn Cummings was the owner on paper.

Q Did you not also tell them about when you went to St. Louis?

A Yes, sir.

Q Did you also advise them that Paris Processing, Inc., was a wholly owned subsidiary of Skyproof?

A Yes, sir.

Q Did you advise them that you, Bernard Schafstall, would be present and general manager of Paris Processing, Inc.?

A Yes.

Q You were in fact at one time president, weren't you?

A That's what I was informed.

Q You wrote checks, didn't you?

A Yes, sir.

Q Did Mr. Harrison Cronic write checks? Did he even have the power to write checks on Paris Processing?

A I never saw him write a check.

[361] **WYLIE C. MERRITT, JR.,**

having been first duly sworn, was examined and testified on his oath as follows:

DIRECT EXAMINATION

BY MR. GREEN:

Q Would you state your name to the Court and Jury, please?

A My name is Wylie C. Merritt, Jr.

[418] **CROSS EXAMINATION**

Q Mr. Green has advised all of us here today that you have made a deal with the government, is that correct?

A I have been granted immunity for my testimony, yes, sir.

Q Isn't it true that if your testimony is satisfactory to the government, the indictment will be dismissed as to you?

A That's my understanding, yes, sir.

Q That works in reverse, does it not? Your testimony has to be satisfactory before that indictment will be dismissed?

[419] A My agreement is that I will testify candidly and honestly to knowledge that I may have.

Q To make sure that you understood this agreement, it was put in writing, was it not?

A Yes, sir.

Q Have you had occasion to discuss this case with Miss Cummings?

A No, I have not.

Q When did you last visit with the United States Attorney or Postal Inspector concerning this case?

A This morning.

Q When did you visit with either office before that?

A On Tuesday of last week, I believe.

Q You're a licensed CPA in the State of Oklahoma, are you not?

A Yes, sir.

Q Is there not indeed some licensing procedure that you have to comply with to get a license?

A Yes, sir.

Q Isn't it true that there is a Board which governs this licensing process, sets the standards for CPA's?

A That's correct.

Q Isn't it true that with a felony conviction you would likely lose that license?

A That's correct.

[420] Q That's a threat to your livelihood, isn't it?

A Yes, sir.

Q You don't want to lose that license, do you?

A No, sir.

* * *

[425] Q Did you not at least on at least one occasion have opportunity to meet Mr. Cronic's aunt in Georgia?

A Yes, sir, I did.

Q Is it not a fact that you knew or learned that she was a fairly wealthy woman?

A That's correct.

* * *

[426] Q The government has alleged a conspiracy in this case, has it not?

A I'm not sure, Mr. Colston.

Q Have you ever been furnished a copy of the indictment?

A Yes, sir, I have, but I do not recall the words or the term conspiracy. It may be there, I just don't recall it.

[427] Q But with your cooperation, the government intends to dismiss as to you, does it not?

A With my testimony, yes, sir.

Q The government has also alleged Skyproof was a sham, a fraud and a pretense, hasn't it?

A Yes, sir, I believe there is language in the indictment to that respect, yes, sir.

Q In fact, wasn't it a going business and a growing business?

A To my knowledge, it was, yes, sir.

Q Isn't it true that Skyproof wanted your firm to do their bookkeeping and financial work so that everything could be centralized?

A Yes, sir, that's correct. That was my understanding.

Q Isn't it also true that your firm used a computer?

A Yes, sir, that's correct.

Q Do computers have some kind of memory bank?

A Yes, sir, generally.

Q Are you denying that you were in any way involved in a conspiracy to defraud anyone?

A Yes, sir.

Q But yet they wanted you to have the information on your computers?

A That was my understanding, yes, sir.

Q Isn't it true that in your written statement to the [428] Norman Bank of Commerce, you said Miss Cummings would mail checks to you?

A That's correct.

Q Isn't it also true that in your statement you did not say Mr. Cronic would mail checks to you?

A That's true, as I recall.

Q Isn't it also true that in your statement you said Miss Cummings would call you to verify deposits?

A That's true.

Q Isn't it also true that your statement does not say Mr. Cronic called you to verify statements?

A I don't recall that it does, no, sir.

Q Were you paid for your services in connection with the work you did when Skyproof purchased Paris Processing?

A Yes, sir.

Q Isn't it true that you were paid by Skyproof checks?

A That's right.

Q Isn't it true that in your statement to Norman Bank of Commerce of October 14, 1975, you said Miss Cummings called concerning depositing of the checks.

A Yes.

Q Isn't it also true you did not say Mr. Cronic called concerning depositing of the checks?

A To my recollection that's correct, yes, sir.

* * *

[429] Q And there was no crime being committed, was there?

[430] A Not to my knowledge.

* * *

REDIRECT EXAMINATION

BY MR. GREEN:

Q Mr. Merritt, with reference to question that Skyproof wanted to use your firm to centralize its accounting system and I believe you answered, yes, that is what you were told by Mr. Cronic; is that right?

A Yes, sir. I was told that by Mr. Cronic and Miss Cummings both on numerous occasions.

Q Did you ever receive any financial records of Skyproof to set up any type of books or systems of books?

A None whatsoever.

Q Did you ever receive any of their checks to reconcile what was going on between these checks floating between these two banks?

A No, sir.

MR. GREEN: I have no further questions.

* * *

[432] ROBERT W. BUMGARNER,

having been first duly sworn, was examined and testified on his oath as follows:

DIRECT EXAMINATION

BY MR. COLSTON:

Q Would you state your name to the Court and Jury, please?

A Robert W. Bumgarner.

Q And, Mr. Bumgarner, what is your profession or occupation?

A I'm president of the Norman Bank of Commerce.

Q You reside in Norman, Oklahoma, sir?

A Yes, sir.

[467] CROSS EXAMINATION

Q You don't have what you described as a kite scheme as large or of the magnitude of this one that you had to deal with with the Skyproof matter, did you?

[468] A No, sir, it wouldn't take long to put a bank out of business if you had very many of those.

Q Now, the note that is Defendant's Exhibit 1, I believe it's $484,915.76. You stated that there were some monies left with the Metropolitan in case they had other claims coming in which they eventually returned to you some $34,167.03, is that correct?

A That's right.

Q That made the total shortage of this figure that's being mentioned a lot $419,082.79?

A Yes, sir.

* * *

[469] CAROLYN S. CUMMINGS,
having been first duly sworn, was examined and testified on her oath as follows:

* * *

[470] Q Would you state your name to the Court and Jury, please?

A Carolyn Cummings.

Q And, Miss Cummings, what city do you reside in?

A Tampa, Florida.

Q And are you acquainted with Wylie Merritt and Harrison P. or Harrison Prather Cronic?

A Yes, sir, I am.

Q The person whom you know and knew as Harrison P. Cronic in the Courtroom?

A Yes, sir.

Q Would you identify him, please?

A In the green suit standing up.

MR. GREEN: Let the record show that she's identified the Defendant at Counsel table.

THE COURT: She does.

Q (By Mr. Green) How long have you known Mr. Cronic, Miss Cummings?

A Since 1971.

[475] Q Why were you listed as the president of Skyproof?

A Harrison had previously been involved in a company named Revere Homes that operated out of Eloise, Florida. It was a very—it had a good reputation, but unfortunately they were either under financed or had problems. I really don't know, I wasn't involved in the situation over there. So I can't say exactly. The company finally went bankrupt. There was a lot of publicity in the local newspapers about it with Harrison's name in all of the articles. Because of this and also Harrison related to me that the Internal Revenue Service had levied against him in the amount of $60,000.00 for payroll taxes that he could not own anything in his name. First of all, because of the publicity and second, of course, because the IRS would come against anything he would say was his.

* * *

[479] Q Miss Cummings, did you ever at any time sign over or tell Mr. Cronic that he was to act, negotiate or to do things on behalf of Skyproof in your role as president?

A I signed many papers. I signed anything Harrison asked me to sign. So far as me directing him to do anything on the contrary was really the other way around.

[480] Q Meaning that he told you what to do?

A I took orders from him, he certainly didn't take them from me.

* * *

[487] Q Did he tell you any[illegible]g to do to get ready in preparation for this bottling company?

A Well, I guess I would probably have to go back a little bit, you know.

Q All right.

A Okay. Originally, when we arrived at this tight cash flow situation, Harrison came with these checks from Wylie Merritt and, he said,—they were all blank with Wylie's [488] signature on them and he, told me to send Wylie some blank checks with my signature on them. And then as we used these checks of Wylie's that then Wylie would ultimately deposit like checks of ours in his account.

Harrison explained as we were struggling and having trouble with cash flow that all companies do this. It is floating, but it gives you an inflated balance and after a couple of months of this you can go to a bank and you can show them your bank statements and you have figures that look terrific. And he said this lends credibility to a business and it will give us borrowing power.

So originally I think the deposits started off rather small. But instead of the original way it was explained to me that these were just monies that didn't exist, one counteracting the other and balancing it off. Harrison wasn't ultimately drawing down on these funds that didn't exist.

When the RC Cola Bottling Company transaction came into being, Harrison said within the next week or so you have to deposit an extra $200,000.00 to cover the sale of this company, which I did.

* * *

[494] Q All right. Did you know that while you were doing this, mailing these checks and depositing these checks there in Florida and the Norman Bank, did it ever occur to you that something might be remiss, something was wrong?

A Well, it occurred to me. I think that the biggest point where it occurred to me was the point where Harrison told me to deposit the extra $200,000.00. It was hard to keep track of money in such large amounts when you weren't—I couldn't keep any records, so I didn't really know what kind of figures were going. And Harrison said if yo're nervous or upset, call the bank and get the balance. So I would call the bank and they would say there's $350,000.00. I really had no idea what kind of money there was or wasn't.

* * *

[507] Q (By Mr. Green) Now, with reference to the problems and difficulties that you were having in October 1975, did you sign the contract transferring over the stocks and the assets of Skyproof over to Norman Bank of Commerce?

A Yes, sir, I did.

Q And under what circumstances did you sign the transfer?

A The day before Thanksgiving in 1975, which was a Wednesday, I got a call from my attorney and he said, get down here right now. A representative from the Norman bank is here. I have looked over these papers he wants you to sign and I want you to come down here and sign them.

* * *

[517] Q Are there any checks in there to you or Mr. Cronic either one?

A To us?

Q Yes.

A Let me—may I look through there?

I don't believe we ever took a pay check but—no, sir.

* * *

[522] CROSS EXAMINATION

BY MR. COLSTON:

Q Miss Cummings, isn't it true that you were the president of Skyproof Manufacturing, Inc.?

A Legally, but not morally.

[523] Q Isn't it true that you were the sole stockholder of Skyproof?

A I don't have any idea.

Q Who, besides you, had stock?

A I don't have any idea.

Q Isn't it true that you did bookkeeping for Skyproof?

A I did no bookkeeping for Skyproof. We were not keeping a ledger or a journal of any type.

Q Isn't it true that you are the only bookkeeper Skyproof had until Wylie Merritt came along?

A We had no bookkeeper.

Q You knew Wylie Merritt prior to Skyproof, did you not?

A I was employed by him.

Q What was the nature of that work?

A I was a write-up girl.

Q Would you define write-up girl?

A Posting checks.

Q Are you employed today?

A Yes, sir, I am.

Q What is the nature of that employment?

A I'm a girl Friday.

Q Whatever the boss says?

A Not entirely.

Q On several occasions in June, 1975, you called Wylie [524] Merritt about preparation of a financial statement, didn't you?

A I don't remember conversations from me to Wylie Merritt, no.

Q Isn't it a fact that in early June, 1975, there was decision made to send the records of Skyproof to Mr. Merritt in Norman?

A If a decision came, it came from Harrison.

Q Isn't it true that this decision was made because of the disarray of Skyproof's books?

A There were no Skyproof books.

Q Isn't it true that in June, even earlier, Skyproof's business was growing?

A Yes, sir.

Q Isn't it true that in July, 1975, you came to Norman, Oklahoma, and visited with Wylie Merritt about a financial statement?

A I came to Norman, Oklahoma, at some point in regard to Paris Processing. If I came at any other time, it's not in my recollection.

Q Isn't it true that while in Norman, Oklahoma, you asked Wylie Merritt or advised Wylie Merritt that you wanted him to start doing Skyproof's monthly work?

A Aboslutely not.

Q If he testified to the contrary—

A I did not ask Wylie to do anything for Skyproof.

[525] Q Is it not a fact that plans were made to send all of Skyproof's records to Wylie Merritt?

A I don't know.

Q Testimony today in fact this week has indicated that there were three bank accounts, Metropolitan Bank in Florida, the First National Bank in Norman, the Norman Bank of Commerce. Do these accounts all sound familiar to you?

A The only account that wasn't familiar with it all was that First National, whatever you stated.

Q Isn't it true that yours was the only authorized signature on the Metropolitan account?

A Certainly.

Q Isn't it true tht yours was the only authorized signature on the First National Bank of Norman account?

A No, I never signed anything on the First National Bank of Norman.

Q Isn't it true that yours was the only authorized signature on the Norman Bank of Commerce?

A Yes, that's correct.

Q Miss Cummings, you have been a Defendant in this case, have you not?

A Yes, sir.

Q Have you been furnished a copy of the indictment?

A I have been furnished a copy, I didn't read it, but I was furnished a copy.

[526] Q In the indictment, it states as follows:

"Skyproof Manufacturing, Inc., at the material times and places was largely a facade and pretense."

The truth is that Skyproof Manufacturing was an ongoing and growing business?

A I didn't say it wasn't. I think I testified earlier that during one year we had sales of $150,000.00.

Q That portion of the indictment would not be true, would it?

A No, it wasn't true.

MR. GREEN: Just one moment. We object to what her opinion is, it's for the Jury—

THE COURT: No. Well, it's for the Jury ultimately, but they can hear the testimony.

Overruled.

Q (By Mr. Colston) You pled guilty to counts containing that allegation, didn't your?

A Yes, sir.

Q There were 13 counts in the indictment, were there not?

A Yes, sir.

Q Ten counts are to be dismissed as to you, are they not?

A Have been dismissed.

Q You pled guilty, as I understand it then, to [527] counts 1, 2, and 3, is that correct?

A Yes, sir.

Q Each of those counts deal with checks written to Wylie Merritt, Jr., CPA, don't they?

A Yes, sir.

Q Are you aware the Wylie Merritt has testified in this Courtroom today that there was no kiting scheme involved at First National Bank of Norman?

A I wasn't privilege to anyone's testimony.

Q Isn't it true that those checks were written to Wylie Merritt for a business purpose?

A Not that I know of.

Q Isn't it true that Wylie Merritt was factoring for Skyproof Manufacturing?

A Not to my knowledge.

Q Could you tell us what factoring is?

A Basically, it's when someone, very basically, would loan you money on sales that expected to get.

Q And then you pay back after the sale?

A When your sales came in and your monies were collected, then the money would be ultimately returned.

Q Isn't that in fact what was happened with Wylie Merritt and Skyproof?

A No, not that I know of.

Q In June and July, 1975, Skyproof had managed to [528] start getting additional credit lines with suppliers, had it not?

A I know of one credit line, there could have been more.

Q Is it not true that Skyproof had to expand its facilities on two or more, maybe three occasions?

A Two occasions.

Q This was due to increased business, wasn't it?

A Yes, sir.

* * *

[530] Q In November, 1975, wasn't there an agreement that you would sign a note, mortgage and transfer of stock?

A It wasn't an agreement. I signed the things, I did not sign an agreement saying that I would sign them, I signed them.

Q I'll hand you what has been marked as Defendants Exhibit 1. Would you identify that, please?

A This is a note to the Norman Bank of Oklahoma, bearing my signature for $484,915.76.

Q It bears your signature three times, does it not?

A Yes, it does.

Q Once as president of Skyproof?

A Oh, yes, sir.

[531] Q Once as president of Paris Processing?

A Yes, sir.

Q Once you individually?

A Yes, sir.

Q How many times does Mr. Harrison Cronic's name appear on that note?

A Harrison Cronic's name never appeared anywhere.

Q that note dated when?

A November 28th, 1975.

Q Isn't it true that on December 9, 1975, Norman Bank of Commerce had the voting rights to the stock and in essence removed all directors and officers at Paris?

A At some time they did, I don't know what date.

Q They literally locked the doors, did they not?

A I wouldn't know, sir.

Q Would you tell the Jury the due date of the first payment on that note?

A I guess it means December 1st, 1981. Oh, wait a minute. Well, due date of the note is December 1st, 1981.

Q First payment was due when?

A First payments were due June 1st, 1976.

Q You have already told us that Mr. Cronic was very upset about you signing these papers, is that correct?

A That's correct.

Q Isn't it true that you knew whoever held the stock [532] to that company had control of it?

A I didn't know I had the stock to the company.

Q Isn't it true that when you transferred the stock, you knew the new holder of that stock had control?

A I don't remember transferring the stock. I signed papers like that in my attorney's office. I don't know what I signed.

Q You literally gave Paris Processing away, didn't you?

A I did what my attorney told me.

Q Mr. Cronic couldn't control that action, could he?

A I couldn't reach him for his advice.

Q I believe you told us earlier today that you couldn't sign a check without his authority.

A That's right.

Q But you could give a company away without his authority?

A I couldn't read Harrison and I was operating under the advice of my attorney.

Q Mr. Cronic did a lot of negotiating work for Skyproof, did he not?

A He did all the negotiating work.

Q For instance, the bottling plant, the purchase of it?

A He literally went out and ran it.

[533] Q Mr. Cronic did the negotiating work and the purchase of that plant?

A Well, either he or Wylie. I realy don't know who did it.

Q Isn't it true that before the deal could be closed, you had to sign the purchase agreement?

A I signed something.

Q Now, you advised the Jury today that you have made a deal with the government, is that correct?

A I guess that's what you call it.

Q Isn't it true that you did so with the hope that you would never go to prison?

A I did so with the hope that I would not spend more than 15 years in jail.

Q You fully expect the maximum then?

MR. GREEN: Just a moment, now, we're going to object here. Now, that is something beyond the—

THE COURT: Well, the question is all right. But I will tell the Jury that nobody knows yet, because I'll do it and I don't know, because I haven't seen the pre-sentence report. But the question is all right. She's got some expectations surely.

I think I explained to her before she pled guilty she could not get more than 15 years. That's the law. That's the maximum under the law.

[534] Go ahead.

Q (By Mr. Colston) Isn't it true that your attorney advised you this was the best way to avoid possible imprisonment?

A No, sir. My attorney advised me to tell the truth. When I went into his office and told him the truth, he said, you have no alternative but to plead guilty.

Q Isn't it also true that if you don't satisfactorily testify, the government can revoke its agreement?

A Interestingly enough, I was going to testify whether the government dropped any charges against me or not.

Q Did you ask them not to drop the charges?

A It was done without my knowledge. This was prepared between my attorney and Mr. Green over the phone.

Q You stood in this courtroom on Monday and heard the agreement, did you not?

A Yes, sir.

Q Isn't it true that as late as 1977, you represented to the United States government that you were the sole stockholder in Skyproof?

A How do you mean that? Represent to the government? How do you mean that?

Q Isn't it true that you had withholding problems at Skyproof, withholding tax problems?

A I never met with the IRS or anyone regarding the [535] Skyproof taxes. Harrison met with them, I never met with them.

Q Isn't it true that you're making a monthly payment on a levy even today?

A Yes, I am. That was also levied against Harrison in federal court.

Q Isn't it true that you were asked to list all of your assets?

A Yes, sir.

Q Isn't it true that you listed all the stock of Skyproof as an asset?

A It listed in the presence of the Internal Revenue Service agents, explaining to him that I did not know what I owned or did not know what I owned, and he said if I remotely thought I owned it, to put it down to avoid perjury.

Q By trade, have you been a bookkeeper in the past?

A I am a bookkeeper.

Q Does that imply that you can add and substract?

A Most people can add and subtract, yes sir.

Q You were the only person authorized to write checks on any of those 3 accounts, weren't you?

A I was the only person authorized to sign checks.

Q Isn't it true that your name apeared on every check written by Skyproof?

A Yes, sir.

[543] WALLACE E. PUGSLEY, JR.

having been first duly sworn, was examined and testified on his oath as follows:

DIRECT EXAMINATION

* * *

[548] Q All right. Now, with the reconciliation at the Metropolitan Bank of Tampa.

A this account was opened on April 22 of '75 and during this period of time in reconciling the bank statement, this account was overdrawn on the first statement on March 30th, 1975, in the amount of $33.75. May the 30th overdrawn in the amount of $10,178.00. June 13th, $6,671.54. June 30th, $43,812.18. July 15th, $54,722.08. July 31, $95,970.78. August the 15th, $78,186.22. August 29th, $232,706.55. September the 15th, $289,504.47. September the 30th, $11,327.14. October the 15th, the first time it would have a plus balance $541,164.42. This being the fact that this bank had ceased paying any checks drawn on the account.

In the source of funds deposited in this account during this period of time from the deposit slips, I ascertained that $278,770.34 came from the source of Cronic, either Cronic, Inc., or H.P. Cronic, Inc. $88,237.84 from Wylie C. Merritt. $4,600,881.39 from Skyproof at Norman and others $172,062.60 for a total deposit of $5,140,069.14.

* * *

[557] HUBERT N. FIVEASH,

having been first duly sworn, was examined and testified on his oath as follows:

[558] DIRECT EXAMINATION

BY MR. GREEN:

Q Would you state your name to the Court and Jury, please?

A Hubert N. Fiveash.

Q Mr. Fiveash, whom are you employed by?

A The U. S. Postal Service.

Q In what capacity are you employed with the U. S. Postal Service?

A Postal Inspector.

Q And of what office are you stationed?

A Memphis, Tennessee.

Q You have a particular area of work that you perform as a postal inspector?

A I'm considered an audit specialist.

* * *

[562] Q That was a total of how much then, in the wire transfers and the others coming into the Norman Bank?

A $4,143,000.00 in checks, just float checks. $697,000.00 during the period June through October were wired from Tampa, Florida, into the Norman Bank, making a total of $4,841,000.00.

Q All right, sir.

A Now, the further analysis was specific areas where the funds withdrawn. In other words, what was the purpose of drawing out. Other than of the normal operating expenses payable to suppliers and so forth, I identified specific individuals like H. P. Cronic and Cronic, Incorporated, withdrew from the bank two hundred and forty one thousand, four hundred sixteen fifty-four.

* * *

[566] MR. GREEN: With that, the government rests, your Honor.

THE COURT: I think we will wait until the morning to start putting on your evidence, it's almost quitting time so let me see Counsel just a moment at the side bar, please.

(Whereupon, the attorneys approached the bench and had an off the record discusion out of the hearing of the Jury.)

THE COURT: We are going to take a recess until tomorrow morning. Every Thursday morning I hold a motion calendar and the Clerk was showing me the one for tomorrow. It's a fairly lengthy calendar. I don't know how long it will take, but we'll try to rush through and get through by 10:00

o'clock. You may have to wait on us for a few minutes, but anyhow you're going to be recessed until 10:00 o'clock tomorrow morning and we will get back to this case just as quickly as we can after we finish the Motion Docket.

You are recessed until 10:00 o'clock tomorrow morning.

(Whereupon, Court was in recess from 5:00 o'clock July 16, 1980, until 10:30, July 17, 1980, at which time the following occurred.)

[567] THE COURT: Sorry to be late, but it just took longer to conclude our motion docket than we thought.

Now, when we quit yesterday afternoon, the government rested its case. We will now hear defense witnesses.

MR. COLSTON: May I approach the bench, Your Honor?

THE COURT: Yes, come up, Mr. Green.

(Whereupon, the attorneys approached the bench and had an off the record discussion out of the hearing of the Jury.)

THE COURT: I'm sorry, we're going to be recessed a few more minutes. Just be at ease if you would like. I must talk to Counsel in chambers.

(Whereupon, the following was had in chambers out of the hearing of the Jury.)

THE COURT: The Defendant has made a motion to dismiss the indictment and each count contained therein for the reason and on the grounds that the government has wholly failed to prove any case as against the Defendant and I am going to deny that motion. It's a matter that the Jury must decide.

Now, the defense lawyers indicated to me that you do not intend to call any witnesses?

MR. COLSTON: That is correct, Your Honor.

THE COURT: I want to talk to Mr. Cronic a moment about that and be sure that you understand all of your [568] rights. This young man, Colston, I think, has done a tremendous job representing you.

THE DEFENDANT: I agree, certainly agree.

THE COURT: You acted at one time that you weren't happy, but that was earlier when you hadn't seen him in action.

THE DEFENDANT: I am certainly glad you overruled me.

THE COURT: He's a very fine young lawyer and this other young man over there too. I'm sure they told you this, but sometime the Courts should sort of intervene and help any way I can.

THE DEFENDANT: Yes, sir.

THE COURT: And I want to be sure that you understand your right to testify if you wish or to remain silent if you wish. If you did testify you would be subject to cross examination and you know that if you fail to testify I will give the instruction, that is if you wish, but that I don't give unless a defendant requests it because some defendants prefer not to have it and that is that the Jury should not infer anything by reason of your failure to testify, just constitutional right that you have not to testify and the burden is still on the government. Most people wish it given. I take it you wish it given?

THE DEFENDANT: I would have to defer to Counsel.

[569] THE COURT: You leave it with your lawyer, you know, let me show it to you. You've got one here, let's don't shoot from the hip and show it also to Mr. Colston.

Let the record show that we are showing proposed Instruction 10-A at Page 27-A.

THE DEFENDANT: Yes.

THE COURT: I take it you wish it given?

THE DEFENDANT: Yes, sir.

THE COURT: Now, the thing I want to be sure, Mr. Cronic, that you understand is that if the Jury convicts and they very well could, you know,—

THE DEFENDANT: Yes, sir, I understand.

THE COURT: They may not, but they very well could sometimes defendant says, well, I wish I had of testified, maybe I wouldn't have gotten convicted if I testified and called that girl a liar, I don't mean that literally.

THE DEFENDANT: I understand, Your Honor.

THE COURT: If I had refuted it that there might have been a different result, but, it's too late then, you see.

THE DEFENDANT: Yes, sir.

THE COURT: You don't get the second guess. But you fully understand that?

THE DEFENDANT: Yes, sir. It is my understanding that if I did take the stand, my prior conviction could be used against me.

[570] THE COURT: On cross examination it could and the only one I know of, Mr. Cronic, in that regard, I guess is the one that show—

THE DEFENDANT: Yes, sir.

THE COURT: —it shows that you were convicted in Tampa, Florida, in—

THE DEFENDANT: 1973

THE COURT: Well, this actually shows you were arrested 9/21/73 and I guess the conviction would be 3/15/74.

THE DEFENDANT: Yes, sir.

THE COURT: Or that may have been when you received it, but it was an offense of false statement to a bank.

THE DEFENDANT: Yes, sir. I pled guilty to that and I was sentenced.

THE COURT: Six months to serve, two years probation.

THE DEFENDANT: Yes, sir. The discrepancy in the dates there is where Judge Arnold Hogan, who was the sentencing judge sentenced me and gave me 30 days to get my affairs in order before I reported, that's where the difference was.

THE COURT: All right. And I take it, of course, your word is that this is the only conviction, certainly looks like—

[571] THE DEFENDANT: Yes, sir.

THE COURT: And it's supported because you were apparently fingerprinted when you were arrested on this charge in February of this year.

THE DEFENDANT: Yes, sir.

THE COURT: And it shows no other convictions.

THE DEFENDANT: Yes, sir.

THE COURT: All right. Then, I think that concludes the record unless you have questions now.

THE DEFENDANT: No, sir, I don't.

THE COURT: I think your decision to not take the stand is intelligently made with knowledge of all of your options.

THE DEFENDANT: Yes, sir.

(Whereupon, the following record was made in the Courtroom out of the hearing of the Jury.)

THE COURT: I want to make a record on one thing I forgot, but the second after the Court Reporter left in there, Mr. Cronic expressed his personal appreciation of these lawyers for the good work they have done and he wanted to make it a part of the record.

THE DEFENDANT: I would also like to state the reason I went up to Mr. Colston's office yesterday was so that Mr. Emery, his senior law partner, would know that before I either won or lost.

[572] THE COURT: All right. The reason I wanted to call you back here is you had a motion for the subpoena of certain witnesses at the government's expense and I granted it and it helped getting some of them served or one of them rather served down in Florida. You have no problem in that regard, the witnesses were here, you just decided not to put them on?

MR. COLSTON: That's correct, Your Honor.

THE COURT: All right.

* * *

[581] THE COURT: All right. Mr. Colston, you may close the argument on behalf of the Defendant.

MR. COLSTON: Ladies and gentlemen of the Jury, I want to also express my appreciation for your attentiveness and I want to express my personal appreciation for your patience with me in this case.

Now, the Judge later on today will give you instructions. One of these instructions is going to deal with the issue of reasonable doubt. If any one of you has a reasonable doubt, you can't convict this man. Any one of you. [582] Not all twelve of you. You're individuals, you can think, you can look at the evidence for yourselves and make your own decision. Don't let people lead you. Now, it could be at some point, say 11 people think one thing and one person thinks another. That doesn't make that person's doubt unreasonable.

Now, the government has alleged that Mr. Cronic has come up with some $200,000.00. I think they said in excess

of $200,000.00. You can look at the evidence. You can look at the exhibits, figure it out for yourself.

The government has stated that Carolyn Cummings has come out with some $40,000.00 or better. Again, you can determine that. She says she got nothing.

Mr. Wylie Merritt has testified that he made a profit of some $1300.00 on his factoring arrangement with Skyproof. The government says that he and his partner have cleared some $20,000.00.

Now, in the indictment, the government has alleged a scheme. When I got into this case three or four weeks ago, I did not think there was any scheme whatsoever. Now I do. But let's look at what the scheme was. We have the Norman Bank of Commerce who discovers a huge insufficiency in its accounts. It gets worse. What does it do? Calls the people and within 30 days or so, they have a note, a mortgage, and the corporation's stock. What was the size of the note? The exact amount of the insufficiency. Now, let's take this [583] in sequence. We have a note of November 28th, 1975, at the same time the bank got the note it got the stock. Eleven days later the bank had that plant. The first payment wasn't due for another 5½ months. The bank put its people in there, taking the plant over and to this date that plant remains with the Board of Directors or members of the Board of Directors of that bank.

Now, you heard the president of the bank say that the bank examiners made us remove the biggest portion of that note from their books. Did you hear one bank examiner in this room? Did you see one? No. You also heard the president of that bank say that we don't loan to anybody, no customers, more than $170,000.00. But think back, one of the last things Mr. Bumgarner did was to identify a mortgage from Har-Mar Bottling Company to two of its Board of Directors. What was the amount of it? $504,000.00 with a commitment for an additional $170,000.00. If that bank wasn't fully secured and collateralized with a loan of $484,000.00, how could he say they're secured and collateralized with a loan of some $674,000.00? None of that makes any sense, ladies and gentlemen. I agree there is some scheme there.

Now, the government has tried to make you believe from the word go when it wrote that indictment, it wanted you to believe that was a sham corporation. When we were here Monday for opening statements, what did I tell you? I said [584] with the government's own witnesses I will prove to you that is not right. Now, what did each of these witnesses say? Wylie Merritt, the government's star witness. I know they're doing business because I did business with them. I made $1300.00 doing business with them. Mr. Green has the gall to call his own star witness a liar. Bernard Schafstall, the plant manager of Skyproof at the government's request, he makes an estimate of what they're making down there, what are you billing out? Oh, $30,000.00 a month. That's $360,000.00 a year. What else did he tell you? That business was good enough that they had to expand not once, but twice. Carolyn Cummings, the government's other star witness. What was her testimony? $150,000.00. We expanded not once, but twice. Ray Myhr comes in from a lumber company who does business with Skyproof. What does he tell you? There were times when they bought all the lumbar I could give them. Is that a sham? That business was ongoing, it was growing. The indictment is written such that the government wants to make you think if Mr. Cronic is guilty of one count, he must be guilty of all of them. Go in reverse. If he's not guilty of one count, is he guilty of any?

What has happened here? One of the government's star witnesses got on that witness stand yesterday. Wylie Merrit. What did he tell you? The first three counts of that indictment are not true. Ladies and gentlemen, he was under an agreement [585] which he described to you, I have got to testify to please the government or they may not dismiss these counts against me. He had the nerve to sit there and tell you the truth.

The government has talked about no intent or inability to cover these overdrafts. Go back, as soon as the bank sees that it's—it's considerable size, it worries them. They get a note and mortgage face amount equaling the overdraft. Look at the note when you go to the jury room. Have you seen them? You can look at it.

The government has testified here that the loss is supposed to be $484,000.00. Look at the note. The president says he can't show it on the books at that mount, but yet he can show one at 50 percent greater amount?

You also heard Wylie Merritt testify in respect to ability to cover that he personally met Mr. Cronic's aunt, Mrs. Chestia Absen, and he knew that she was of sufficient wealth to be able to cover it herself. Why should he cover the note? He didn't have anything to do with it.

Now, we get to the ownership. Who owns what? Think back again to Monday morning when I was talking with you, Monday afternoon. I said, look, you're going to hear this man's name tossed around. I have no doubt of it. Listen, listen, it's your obligation to listen but look at what the people did, not what they said.

Mr. Bob Dill represents the estate who sells the [586] bottling plant. Hints were made that there may be some kind of trust situation, she was out front for him. Did he show you a trust instrument? Where she said and admitted that she held title for him. Wylie Merritt in an anti-trust instrument hinted that she held in trust for him. Did she ever sign a document admitting that she was only a trustee? When Mr. Bob Dill got ready to have the purchase agreement, did he go to what he called the true owner? No.

Mr. Bernard Schafstall, the plant manager, they became plant manager at the bottling company. What did he tell us? Harrison owned it. What did he do? He testified he went to St. Louis, the headquarters of 7-Up and tried to get the franchise changed and what did he tell those people? Skyproof owns Paris Processing, Skyproof is a going business, Carolyn Cummings owns the stock of Skyproof.

Mr. Heiple comes in, the attorney for the bank, adamant Harrison Cronic was that corporation. But yet when it's time for action, he and Mr. Bumgarner both testified that Mr. Heiple was involved in preparing the note, mortgage, stock transfer and Mr. Heiple is an attorney and Mr. Heiple knows he better get it in advance from the true owner. Did you see one from Harrison Cronic?

Mr. Bumgarner, president of the bank, comes in and talks about the ownership of Paris Processing. He didn't

say, "I think Harrison Cronic owned it, I know he did, I saw the [587] stock certificate. Do you recall yesterday we had a little lengthy lunch so the Norman Bank of Commerce could get the papers up here they're supposed to have. One of them is a stock certificate. When he was faced with it, he says, I was wrong, Skyproof owned Paris Processing. Look at the stock certificate. You can see. You're entitled to it.

Three bank accounts we have been talking about here in these last four days. Did you see one account in which this man could take a red cent out of? If you go down and open a bank account in your name, how can I go take the money out of it? How can I profit that way?

You also have been told by just about everybody that testified it looks like he was doing just about all the work that was done there, at least on an administrative level. Why wouldn't you make some money? Why wouldn't he be paid a good salary?

Carolyn Cummings. I didn't know anything. I didn't make anything. The government said she made over $40,000.00. I will leave that to you and you can look at the checks and figure it out for yourelf. But I want you to look at every check. You will be able to see the checks if you want them. Two people signed every check that will be in that room with you. Carolyn S. Cummings, Wylie Merritt, Jr. Nobody else. If she comes in and says, look, I can't sign a check unless Harrison tells me to. And then she admits that he [588] is in Paris, Texas, but she covers it; the telephone. Show me a telephone bill. It's easy to say things. Show it to us. They don't want you to see some of these documents.

One of the principal elements of this case, mail, that is why we have a postal inspector over here. Fidelity bank sent not one, but two gentlemen over here to testify about mailing. They hemmed and hawed on direct examination trying to lead you down the path making you think they knew they mailed it. On cross examination under oath, did not both of those gentlemen testify that they could not tell you of their own personal knowledge that any of these checks were mailed. None of them. They brought in these receipts. Look at the receipts when you go into the jury

room. You can't anymore tell what is on those receipts than a man in the moon. There's one thing they could tell us we were told yesterday that there's something called a mailing list, I believe, and it existed for two years after the fact. Mr. Pugsley, I have no reason to doubt that man's ability, he's been on this job for over 30 years, but what did he tell you? I made a mistake and I didn't do a good job. Well, there have been some things that the government didn't want to show you, didn't want to produce possibly. Mr. Bumgarner didn't want to see that stock certificate, did he? Did he not want you to not see those mailing lists? They've got to prove it. They can't just tell you. Show you. The government had five years to produce [589] the single most important document in this case. It's not in evidence. Mr. Briscoe, one of the gentlemen from Fidelity, tells us begrudgingly, there were times we didn't use express mail. Try to get away from that.

Ladies and gentlemen, you remember you're going to be instructed as to reasonable doubt. All of these things can't contribute, if not, individually creating that doubt accumulatively. Keep it is mind. Think of yourself. What did you hear and what did you see? They're trying to make you think this man is Houdini.

Carolyn Cummings said, well, I gave the plant away and he wouldn't speak to me for a week. I guarantee you, if my wife gave away a half a million dollars, it's going to take me more than a week to get over it. Carolyn Cummings said I can't sign checks unless Harrison tells me but when it came time to give the whole thing away, she says, I did what my lawyer told me to do. Not what Harrison told me to do. By the way, didn't she say, my lawyer, didn't she? How could her lawyer know the facts unless she told him? She didn't say Skyproof's lawyer. My lawyer.

Just please keep in mind what I talked to you about and listen to what the witnesses said, look at what they did.

Now, let's go back to the indictment. There are 13 counts in that indictment. Again, it's written to make you believe if you're guilty of one you're guilty of all. But I [590] say the reverse is true also. If you're not guilty of one, you're not guilty of any of them. The government's own witness

that it dismissed as to all counts says those first three are just not true.

What did Miss Cummings do? Chose to plead to those three counts. Well, that's pretty easy because the next star witness coming right behind her saying didn't happen anyway.

Ladies and gentlemen, you have been sworn to uphold the law and to follow the law. But by the same token, you're here for justice. What's happening to Wylie Merritt? That man was free yesterday, he is today and tomorrow unless the government gets mad at him for telling the truth and chooses to come back. Carolyn Cummings, she's guilty to three counts, the other witness said it didn't happen anyway. What's going to happen? But yet the government wants you to find my client, Mr. Harrison Cronic guilty of 13 counts, three of which its own star witness says, no, it didn't happen.

Any reasonable doubt any one of you, and you cannot convict my client. Don't let people stampede you. Think for yourself.

Thank you.

THE COURT: Thank you, Mr. Colston.

* * *

[598] MR. GREEN: Judge, I'm sorry, I think we need one expert witness instruction. We qualified Mr. Fiveash specifically as expert and we had Browning.

THE COURT: Well, expert testimony was heard and it would be proper if fact matters hinged on the expert, but here [599] it doesn't.

MR. GREEN: All right.

THE COURT: I don't believe it's necessary and especially if the Defendant doesn't think it is.

MR. COLSTON: I don't think it really does, Judge.

MR. GREEN: Well, I had submitted this, but perhaps we might on that legal ownership, unless they ask a question—

THE COURT: I don't think so, because we have got here aider and abettor and it doesn't make any difference even if they both were legal and equitable owners if he aided and abetted.

* * *

THE COURT: Well, boys, I want to tell you again I [600] appreciate you two, you know, this guy couldn't have got a better representation if he had hired someone in Florida or Oklahoma City or anyplace else and I appreciate it.

IN THE UNITED STATES DISTRICT FOR THE
WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, PLAINTIFF

v.

HARRISON P. CRONIC AND CAROLYN S. CUMMINGS,
DEFENDANTS.

SENTENCING
HAD BEFORE THE HONORABLE LUTHER B. EUBANKS
ON AUGUST 28, 1980
IN OKLAHOMA CITY, OKLAHOMA

APPEARANCES:

MR. JOHN E. GREEN, First Assistant, United States District Attorney, Federal Building, Oklahoma City, Oklahoma, appearing on behalf of the Government.

MR. CHRIS E. COLSTON, First National Bank Building, Oklahoma City, Oklahoma, appearing on behalf of the Defendant, Cronic.

MR. ARNOLD D. LEVINE, of Tampa, Florida, appearing on behalf of the Defendant, Cummings.

[2] THE COURT: All right, United States versus Cronic and Cummings. This comes on for sentencing. The Defendants, yes, come forward with your Counsel, please.

May I inquire of the Defendant, Cronic, Harrison Prater Cronic, have you and your lawyer read the pre-sentence report in this case?

MR. COLSTON: Yes, Your Honor, we have.

THE COURT: Do you find it to be in acceptable form? That is, are there errors or anything that need to be cured?

MR. COLSTON: It is acceptable, Your Honor.

THE COURT: You find it to be accurate?

THE DEFENDANT: Yes.

THE COURT: Subject to your right to address the Court a little later, is there any just cause, legal or otherwise,

known to either Counsel or the Defendant why sentence cannot be imposed today?

MR. COLSTON: No, Your Honor.

THE COURT: All right. Well, here, I'm going to ask three folks, did you hear what I have said; have each of you read the pre-sentence report?

MR. LEVINE: Yes, sir, Your Honor please, we have read the pre-sentence report and it's in acceptable form and we have no exceptions to the formal content.

THE COURT: Is that your—

* * *

[3] MR. COLSTON: Your Honor, Mr. Cronic and I are aware of the requirements you set forth in our conference concerning a possible probated sentence in this case. Mr. Cronic's family is ready to pay a half a million dollars, whatever the figure is arrived at. The family did want and still wants their own CPA to verify a figure due and owing to the bank because they do want the bank whole. We have run into problems with the bank in that respect and—

THE COURT: Well, as I understand it, I have been getting copies of letters and mailgrams and whatever, that has been promised, as I recall, in a letter from—what's the name [4] of the lawyer for the bank?

MR. COLSTON: Mr. Heiple.

THE COURT: Right. Conditioned only that the federal reserve people approve it and that the money be put up in escrow which would assure that once the audit is made, that it's going to be paid. In other words, not just a dry run. Now, wasn't that the—

THE COLSTON: That was the gist of it. They also had a beginning figure that they demand and that we start at which was not acceptable and that it put certain values—

THE COURT: Well, all right.

MR. COLSTON: But even so, we would ask the Court permission to continue to attempt to reach a settlement because we do want to make the bank whole. There's no question of his family's ability to reimburse the bank and it's their desire to do so.

THE COURT: Well, I am glad to hear that. I think I made it clear when I conferred with you people in Cham-

bers that nearly 30 years on the bench adding the State Court District Judge time, it's the first time I've ever done it, but this is most unusual case and it's not the function of this Court to try and enforce civil responsibilities in a criminal case. I did feel that if restitution would be made it was the appropriate thing to do in this case, I still feel that way and I will not withdraw it, the commitment that I have made, the [5] promise I have made. But we are here today to impose sentence. The Court has the right within 120 days to modify any sentence imposed and if you think you can reach an accord, go to it. If it's more, you recall now we are on record here and we had a Court Clerk taking minutes the other day, although we didn't have a Court Reporter.

MR. COLSTON: That's correct, Your Honor.

THE COURT: The proposal was more than just making restitution to the bank.

MR. COLSTON: Yes, sir.

THE COURT: And I know you communicated, but it also required that this Defendant pay you and the associates that helped you in the trial and not have any expense to the federal government. Also to pay the income taxes and other taxes that were charged against the co-defendant here, as a result of the acts, the court costs including the costs of the prosecution be paid and what else was it; we had a list of all those things. And that there would be a fine of $11,000.00 I think—did the probation officer give you a copy of this handout this morning, the total amount now with the bank's figures subject to a later upward or downward adjustment, dependent upon the audit?

What I have here would be $418,755.36.

MR. COLSTON: We have got the bottom line, Your Honor.

* * *

[7] THE COURT: For you, Mr. Cronic, as I said when the Jury returned its verdict, you're just as guilty as sin and you have swindled these people out of many hundreds of thousands of dollars and got this young lady in terrible trouble in the interim and the Court just has no sympathy at all for you.

But I still believe that as much as I think you ought to serve prison time, I know you have done this same thing before, just got out of prison and turned around and did [8] it again, but in this case because of the fact that some of the people that lost money just can't afford to lose it and I have wrestled with the problem in my mind and finally concluded that if you can get these rich aunts to pay all of these things that that would be better than having you serve a prison time. And I would immediately re-sentence you and I think it's understood that you would be given a five-year probation term.

DEFENDANT CRONIC: Yes, sir.

THE COURT: Now, you have got the keys to the penitentiary in your pocket now, young man.

DEFENDANT CRONIC: Yes, sir.

* * *

DEFENDANT'S EXHIBIT 2

MORTGAGE AND SECURITY AGREEMENT

This indenture made at Norman, Oklahoma, as of this 3rd day of January, 1978, by and between HARMAR BOTTLING CO., a corporation, hereinafter referred to as "mortgagor" and NORMAN BANK OF COMMERCE, a state banking corporation, hereinafter referred to as "mortgagee", witnesseth:

That the mortgagor, for and in consideration of a loan in the amount of Five Hundred Four Thousand and no/100 dollars ($504,000.00) made by the mortgagee to the mortgagor, the mortgagor has granted, sold, assigned, pledged, mortgaged and conveyed, and does by these presents grant, pledge, sell, assign, mortgage and convey, unto the mortgagee, its successors and assigns, the following, to-wit:

> All of the property, both real and personal, tangible and intangible, vested and contingent and wherever situated (hereinafter collectively referred to as "said property"), as more particularly described on "EXHIBIT A—PROPERTY LIST" attached hereto, incorporated herein, and made a part hereof,

together with the leasehold estate(s) or other estate, interest or title owned by the mortgagor or to which the mortgagor is entitled under and by virtue of ownership of, and interest in and to, said property, or to which the mortgagor may hereafter become entitled under the same, or under any other instrument covering any of said property, whether now existing or hereafter given, and all the mortgagor's right, title and interest in and to, all and singular, the tenements, hereditaments, and appurtenances belonging or in anywise appertaining to said property and premises, including all oil stored thereon belonging to the mortgagor, and the mortgagor's proportionate part of the metals, coal, oil, gas, and other minerals in and under said land or which may be produced therefrom, and of the oil and gas wells, oil well supplies, machinery of every kind and character, oil well equipment, buildings, compressors, powers, derricks, pipelines, tanks, casing, tubing, rods,

line pipe, and telephone lines located on said leased premise, and of all casing, tubing, and rods in any of the oil and gas wells located thereon and used in the operation of said premises for oil and gas, and all such other property which may be hereafter placed or located thereon to be used in the production of oil, gas, metals, coal and other minerals.

To have and to hold the said property, with all the right, members, hereditaments, and appurtenances now or at any time hereafter in anywise appertaining or belonging thereto, unto the said mortgagee and its successors or assigns forever: Provided, always, and these presents are upon the express condition, that, if the mortgagor, or the heirs, executors, administrators, successors or assigns of the mortgagor, shall well and truly pay, or cause to be paid, to the mortgagee, its successors or assigns, the indebtedness hereby secured, according to the terms and conditions of the note(s) evidencing the same, as hereinafter set forth, and all other sums secured by this conveyance, as the same become due and payable, and if the convenants and agreements contained in this instrument be kept and performed, then, and in that event only, these presents shall be void; otherwise the same shall remain in full force and effect.

This conveyance is intended as a mortgage, and is given for the purpose of securing the payment of an indebtedness according to the terms and conditions of 3 promissory notes of even date herewith, executed by the mortgagor in favor of the mortgagee in the original amount of $504,400.00 plus lawful interest, as more fully recited therein.

* * *

During any and all times when the notes, and any extensions or renewals thereof, secured hereby are in default, mortgagee may, at its sole option and without notice, exercise voting powers of any corporate stock which is covered by this Mortgage and Security Agreement, and any extensions or renewals hereof.

In witness whereof, the parties hereto have caused these presents to be executed and the appropriate seals affixed as of the 3rd day of January, 1978.

HARMAR BOTTLING CO., MORTGAGOR

BY: Lee K. Martin

LEE K. MARTIN
Vice President

Attest:

Secretary

NORMAN BANK OF COMMERCE: MORTGAGEE

BY: Robert W. Bumgarner

ROBERT W. BUMGARNER
President

Attest:

C. B. Meador

Cashier

STATE OF OKLAHOMA

ss:

COUNTY OF CLEVELAND

Before me, Charlotte F. Edington, a Notary Public, on this day personally appeared Lee K. Martin, known to me to be the person whose name is subscribed to the foregoing instrument and known to me to be the Vice President of HARMAR BOTTLING CO., a corporation, and acknowledged to me that he executed said instrument for the purposes and considerations therein expressed, and as the act of said corporation. Given under my hand and seal of office this 3rd day of January, 1978.

BY: Charlotte F. Edington

CHARLOTTE F. EDINGTON
Notary Public

My Commission Expires:
Nov. 21, 1978

(Notary Seal)

STATE OF OKLAHOMA

ss:

COUNTY OF CLEVELAND

Before me, Charlotte F. Edington, a Notary Public, on this day personally appeared Robert W. Bumgarner,

known to me to be the person whose name is subscribed to the foregoing instrument, and known to me to be the President of NORMAN BANK OF COMMERCE, a corporation, and acknowledged to me that he executed said instrument for the purposes and consideration therein expressed, and as the act of said corporation. Given under my hand and seal of office this 3rd day of January, 1978.

BY: Charlotte F. Edington
CHARLOTTE F. EDINGTON
Notary Public

My Commission Expires:
Nov. 21, 1978

(Notary Seal)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
PARIS DIVISION

No. P-76-37-CA

NORMAN BANK OF COMMERCE, A CORPORATION, PLAINTIFF,

v.

PARIS PROCESSING, INC., ET AL, DEFENDANTS.

ORDER OF SALE

To: The Sheriff of Lamar County, State of Texas:

WHEREAS, on November 17, 1977, the United States District Court for the Eastern District of Texas (Paris Division) in an action wherein Norman Bank of Commerce was plaintiff and Paris Processing, Inc., et al were defendants, plaintiff recovered judgment against defendants Paris Processing, Inc., et al in the sum of $475,665.76 plus interest thereon at 8% per annum from November 28, 1975 until paid plus Court costs and attorney fees of $10,000; and

WHEREAS, this Court further declared said sums to be valid first mortgage liens upon and against the property and premises hereinafter described and further decreed that said mortgage liens be foreclosed against said property and said defendants, and it decreed that an Order of Sale shall issue, directing the sale, according to law and in the manner hereinafter set forth, of such as can be found of the property securing the lien of plaintiff, and

WHEREAS, said judgment remains unpaid and plaintiff has applied for an Order of Sale to issue in accordance with the Order of this Court.

NOW, THEREFORE, these are to command that you forthwith proceed to give Notice of Sale and sell, at public vendue to the highest and best bidder at 10:00 A.M. on the first Tuesday of January, 1978, at the Courthouse door of the Lamar County, Texas courthouse, situated in Paris, Texas, all of the property described on "Exhibit A" attached hereto and made a part thereof. You shall give notice of such proposed sale by posting written notice thereof at least 21 days preceding the sale at the courthouse door of

said Lamar County Courthouse. Plaintiff is authorized to bid at said sale and, if plaintiff is the highest and best bidder, plaintiff shall be allowed a credit against its bid in an amount up to the total amount of its judgment, including interest, costs and attorney fees.

The proceeds arising from the sale of the above-described property shall be applied to the following priorities: (1) costs of this sale; (2) judgment of plaintiff, Norman Bank of Commerce, in sum of $475,665.76 plus interest, costs and attorney fees as described above; (3) the balance, if any, to be paid to the Clerk of this Court to abide the further Order of this Court.

You will make due Return of this Order of Sale with your proceedings endorsed thereon, showing the manner in which you have executed the same, within 60 days from the date hereof.

SIGNED AND ENTERED THIS 30TH DAY OF NOVEMBER, 1977.

/s/ Wm. Wayne Justice
WM. WAYNE JUSTICE
United States District Judge

APPROVED:

/s/
Attorney for Plaintiff
P.O. Box 847, Norman,
Oklahoma 73070 (405) 321-0090

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
PARIS DIVISION

No. P-76-37-CA

NORMAN BANK OF COMMERCE, A CORPORATION, PLAINTIFF,

v.

PARIS PROCESSING, INC., ET AL., DEFENDANTS.

SHERIFF'S RETURN OF SALE

I received the attached Order of Sale on the 5th day of December, 1977, and pursuant to the commands thereof, I did take possession of the property and premises more particularly described on "Exhibit A" attached hereto and made a part hereof. I did cause Notice of the time and place of sale of said property to be given by posting at the Courthouse door of Lamar County, Texas, Courthouse situated in Paris, Texas, more than twenty-one (21) days prior to the date of sale.

On the first Tuesday of January, 1978, being January 3, 1978, at 10:00 A.M. of said day, I offered said property for sale at the East door of the Lamar County Courthouse in the City of Paris, State of Texas, that being the time and place stated in said Notice at public auction, to the highest and best bidder for cash in hand, and sold the same to plaintiff, Norman Bank of Commerce, for the sum of $504,000.00, the same being the highest and best bidder for said property, said bid being credited against the judgment heretofore rendered in favor of plaintiff against defendants Paris Processing, Inc., et al.

I hereby certify that the foregoing is a correct statement of the times and manner of executing said Order of Sale. Signed, dated and returned into Court this 3rd day of January, 1978.

/s/ Roger Peterson
ROGER PETERSON
Sheriff of Lamar County, Texas
BY E. L. LENOIR, *Chief Deputy*

AFFIDAVIT OF LOGAN BROWNING

AFFIDAVIT

STATE OF FLORIDA

STATE OF HILLSBOROUGH

Before me, the undersigned authority, personally appeared Logan D. Browning, C.P.A., who, after being first duly sworn by me according to law, deposes and says that:

1) He is a Certified Public Accountant with an active practice in the city of Tampa, Florida.

2) On or about August 4, 1980, he was asked by Harrison P. Cronic to determine what amounts, if any, were owing by Mr. Cronic, Skyproof Manufacturing, Inc. or Paris Processing Co. to the Norman Bank of Commerce, Norman, Oklahoma, as a result of a recent trial.

3) A tentative date of August 11, 1980 was set for him to visit the bank and Paris Processing Co. in order to determine the accounting transactions recorded by the bank (relative to the transactions with Mr. Cronic, Skyproof Manufacturing, Inc. and Paris Processing Co.) and by Paris Processing Co. (relative to the results of its operations since the time it was taken over from its parent—Skyproof Manufacturing, Inc.)

4) He was informed by both Mr. Cronic and Mr. Colson (an attorney) by telephone that the records would not be made available to him by the bank of Paris Processing Co., according to the attorneys for those companies.

5) He spoke telephonically with Judge Eubanks concerning the importance of such an inspection of the records to determine the amount of any liability and was informed by the Judge that he did not have the authority to require that the records be made available to him—even though the Judge felt it was a reasonable request.

6) He expressed his frustrations to Mr. Cronic verbally and by letter and further advised Mr. Cronic that it would be impossible to determine any such liability if these pertinent records were not made available. (See attached copy of letter dated August 19, 1980 addressed to Mr. Cronic).

FURTHER DEPONENT SAYETH NO.

/s/ Logan D. Browning
LOGAN D. BROWNING

Sworn to and subscribed before me this 12th day of December, A.D. 1980.

/s/ Beverly Ann De Meza
BEVERLY ANN DE MEZA
Notary Public

My Commission Expires:
Notary Public, State of Florida at Large
My Commission Expires Aug. 14, 1984

AFFIDAVIT OF DON MILLICAN

AFFIDAVIT

STATE OF OKLAHOMA

COUNTY OF OKLAHOMA

Before me, the undersigned authority, personally appeared Don P. Millican, a certified public accountant employed by the firm of Price Waterhouse & Co., who, after being duly sworn by me according to law, deposes and says:

1. Mr. Harrison P. Cronic contacted me on or about the last week in July 1980, in reference to conducting a review of books and records of a company with which Mr. Cronic had been associated and the Norman Bank of Commerce to determine what, if any, money Mr. Cronic might owe to these two firms.

2. I informed Mr. Cronic that I would prefer dealing with his attorney in this matter.

3. I contacted by telephone Mr. Chris Colton of Hemry & Hemry, attorneys in Oklahoma City, who confirmed that he was in fact representing Mr. Cronic in this matter. He also indicated, however, that the Norman Bank of Commerce would not, at that time, permit access to the records necessary for such a review.

4. In a later conversation, I informed Mr. Cronic of Mr. Colston's comments.

/s/ Don P. Millican
DON P. MILLICAN

Sworn to and subscribed before me this ____ of the _____ of ____.

Notary Public

_____

(Seal, Signature and Expriation Date)

PSYCHOLOGICAL & EDUCATIONAL CONSULTANTS
Virginia A. Boyle, Ph.D.
539 Green Street, N.W.
Gainesville, Georgia 30501
August 20, 1980
Licensed Applied Psychologist
Telephone (404) 532-9596

Mr. Harrison Cronic
635 Dixon Drive
Gainesville, Georgia 30501

Re: AttorneyRepresentative
Federal Court Case
Oklahoma City, Oklahoma

Dear Mr. Cronic:

In response to your questions regarding the representation and defense of your case by your attorney, Chris Colston, and the quality of his relationship with you as your attorney, I would like to offer the following opinions and impressions of the two phone conversations to which I listened on June 26th and July 10th of this year;

1. Mr. Colston appeared to feel insecure in his position in representing you in the role of a criminal trial lawyer. That probably is not so surprising when it is realized that as a specialist in real estate law, he typically is not called upon to represent his clients in the type of court process which requires open confrontation and knowledge of jury psychology. In any case, in feeling insecure, I am saying that he likely did not feel competent in representing this case. Under these conditions and under the severe time constraints he had with which to acquaint himself with the details of the case as well as with the procedures of this type of case and court presentation which were not characteristic of his practice as an attorney, I would say he was experiencing considerable stress. This could account for the irritability and defensiveness he showed toward you while working on the case. This is also why, when you asked what you could do to improve the situation, I recommended that you attempt to praise the work he did as much as possible, and particularly in public.

2. Mr. Colston did not impress me as being an outwardly aggressive individual but more the type of man who tends to hold feelings inside until he can find a safe way to discharge them or until he explodes in confusion. Consequently, I would not expect him to be a confrontative person who would openly attack conflicting issues nor would he be apt to stir up anger in others, but he would be more likely to delay or avoid it. I would suggest that he was not the most psychologically qualified attorney to represent you in this type of court case which would need an aggressive, confrontive attack on conflicting issues in order that you be fairly represented.

3. It was my impression that Mr. Colton has difficulty responding quickly and clearly while under stress, particularly those types of stress with which he has not coped regularly and successfully. I would hazard to guess that he has become a specialist in real estate law because it does not present the types of stress which are involved in some other areas of law practice. Under stress Mr. Colton might well block and become immobilized. Given time and an opportunity to pull away from the stress, he does seem quite able to objectify and to organize his thinking effectively. However, given the type of court situation in which he is being called upon to function, I do not think he would be able to function as you would need him to function for your best defense.

I would say that I think it would have been in the best interest of a fair and competent representation in your case had Mr. Colston withdrawn himself from it. I think it might have been difficult for him to admit his weaknesses in this instance, and, as such, could not bring himself to withdraw from your case.

I hope these opinions and impressions have been and will be helpful to you in pursuing a fair hearing of your case. Thank you for this opportunity to work with you.

Sincerely,

/s/ Virginia A. Boyle

VIRGINIA A. BOYLE, Ph.D.
Licensed Psychologist

VAB/mv

AFFIDAVIT OF HARRISON CRONIC

AFFIDAVIT

STATE OF GEORGIA
COUNTY OF HALL

Before me, the undersigned authority, personally appeared HARRISON P. CRONIC, who, after being duly sworn by us according to law, deposes and says that:

1.

Mr. Chris Colston, stated to me on several occasions that the actual number of effective working days he had to prepare for the trial which begin on July 14, 1980, was from 18 to 22 days.

2.

I met with Mr. Colston for approximately four hours on Sunday, July 13, 1980, the day before the trial began. This was the only substantive meeting held between Mr. Colston and myself prior to or during the trial.

3.

Mr. Chris Colston was hostile and petulant toward Defendant Cronic. On one occasion during the trial, Mr. Colston told Defendant Cronic in response to a question by Cronic to "(elplitive denoting sexual intercourse) off."

Further deponent sayeth no.

/s/ Harrison P. Cronic
HARRISON P. CRONIC

Sworn to and subscribed before me this 8 day of February, A.D. 1981.

/s/ EVELYN G. PENDLEY
EVELYN G. PENDLEY
Notary Public

My Comm. expires March 12, 1984

Supreme Court of the United States

No. 82-660

UNITED STATES, PETITIONER,

v.

HARRISON P. CRONIC

ORDER ALLOWING CERTIORARI. Filed February 22, 1983.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted.

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NO. 82-660

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, PETITIONER

v.

HARRISON P. CRONIC

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

DAVID W. DUNCAN
Attorney for Respondent
1130 Main Avenue
P. O. Box 179
Durango, Colorado 81301
(303) 259-3000

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NO. 82-660

UNITED STATES OF AMERICA, PETITIONER

v.

HARRISON P. CRONIC

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

David W. Duncan, on behalf of the Respondent, responds to the United States' Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

REASONS FOR DENYING PETITION

The Tenth Circuit Court of Appeals has adopted the test of "skill, judgment and diligence of a reasonably competent defense counsel" in determining claims of ineffective assistance of counsel. Dyer v. Crisp, 613 F. 2d 275 (en banc) (CA 10th 1980), cert. denied, 445 U.S. 945 (1980).

That test is consistent with the decisions of this Court and the government's contention that in order for a conviction to be set aside, the defendant must show, at a minimum, that an attorney's performance in the case was below that of reasonable, competent criminal defense counsel.

In addition, cases in the Tenth Circuit have established that "when circumstances hamper a given lawyer's preparation of a defendant's case, the defendant need not show specified errors in the conduct of his defense in order to show ineffective assistance of counsel. United States v. King, 664 F. 2d 1171, 1172-73 (10th Cir. 1981); United States v. Golub, 638 F. 2d 185, 187 (10th Cir. 1980)

Those circumstances include experience of counsel, time for preparation, accessibility of witnesses to counsel, gravity of the charge and complexity of

defenses. United States v. Golub, (id). The Tenth Circuit weighed all of these factors in its decision in this case.

The King - Golub tests are also consistent with the duty to provide effective assistance of counsel under the Sixth Amendment.

The Government cites Chambers v. Maroney, 399 U.S. 42, 53-54 (1970) for the proposition that relief is not afforded absent some finding of prejudice or likely prejudice to the defendant or adverse impact on the conduct of the case. (emphasis added) While such language is not the holding in Chambers, Justice Harlan in his dissent, did point out that this Court recognized long ago that the duty to provide counsel is not discharged by an assignment at such time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of this case (citing Powell v. Alabama, 287 U.S. 45, 71, 77 L. Ed 158, 172, 53 S. Ct. 55, 84 ALR 527 (1932); Hawk v. Olson, 326 U.S. 271, 278, 90 L. Ed 61, 66, 66 S. Ct 116 (1945).

Consistent with such a duty, the Tenth Circuit under its King - Golub tests reviewed (1) the time afforded for investigation and preparation; (2) the experience of counsel; (3) the gravity of the charge; (4) the complexity of defenses; and (5) the accessibility of witnesses to counsel.

The Tenth Circuit did not hold that "an attorney's lack of relevant experience invariably gives rise to ineffective assistance of counsel," rather they held "that in the facts of this case, applying the criteria set down in King and Golub, Cronic cannot be said to have been adequately represented."

United States v. Morrison, 449 U.S. 321, 101 S. Ct. 665, 66 L. Ed 2d 564 (1981) is factually and legally distinguishable from the present case. Morrison held that pre-trial interference with the right to counsel did not warrant dismissing the indictment.

Finally, the Government's contention, that respondent's comments regarding the performance of his counsel are somehow relevant in determining effective assistance of counsel, is absurd.

Respondent's contention in this case is that the totality of the circumstances in this case amount to a violation of the Sixth Amendment guarantee of effective assistance of counsel. Those circumstances briefly reviewed are:

1. Respondent was indicted on thirteen counts of mail fraud and unlawful use of a fictitious name, 18 U.S.C. §§1341 and 1342, resulting from a four and one half year effort by the Government in front of a grand jury.

2. The Court made it clear to counsel that he would only have twenty-five days to prepare this case.

3. Counsel met with respondent at one lengthy meeting the day before trial.

4. The Government's investigation yielded thousands of documents, including hundreds of checks.

5. The Government's witnesses came from four states.

6. The respondent lived in Florida and Georgia while his counsel lived in Oklahoma.

7. Counsel announced to the jury that this was his first trial. He was not an experienced criminal defense attorney.

8. The Court granted counsel only $300.00 to hire an accountant. No accountant was hired.

9. The transcript denotes virtually no objections by either Colston or Rivas during the trial. The transcript denotes almost no activity on the part of Mr. Rivas, in spite of his affidavit submitted after the decision in this case was rendered by the Tenth Circuit.

10. Defense counsel did not object to any of the instructions or tender any defense instructions.

11. The respondent was convicted of eleven counts and sentenced to twenty-five years and fined $11,000.00.

As the government points out on Page 10 of their Petition for Writ of Certiorari, "the decisions of this Court make clear that in order for a conviction to be set aside under the Sixth Amendment on the basis of ineffective assistance of counsel, the defendant must show at a minimum that his attorney's performance in the case was below the range of competence that

reasonably may be expected of counsel in criminal cases." Respondent asserts that at a minimum such a showing has been made and that, under King, Golub and Powell, the circumstances of his appointment were such that he was precluded from giving effective aid in this case. The Tenth Circuit has employed a test in this case consistent with the Sixth Amendment and the decisions of this Court. To require this Court to make a factual determination of each case is beyond the purpose of the writ of certiorari and the practical limitations of this Court.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

David W. Duncan, #4574
Attorney for Respondent
1130 Main Avenue
P. O. Box 179
Durango, Colorado 81301

November 1982

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NO. 82-660

UNITED STATES OF AMERICA, PETITIONER

v.

HARRISON P. CRONIC

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Respondent, Harrison P. Cronic, moves the Court for leave to proceed in forma pauperis and to file a response to the United States' Petition for Writ of Certiorari without payment of fees and costs and in support thereof shows the Court as follows:

1. On April 19, 1982, the United States Court of Appeals for the Tenth Circuit vacated the judgment of conviction entered in the United States District Court for the Western District of Oklahoma.

2. On October 14, 1982, the United States filed a Petition for Writ of Certiorari in this case.

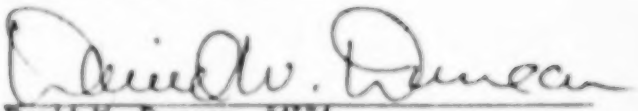
3. Petitioner is unable to pay the fees and costs of this proceeding or give security therefor and had counsel appointed both at trial in District Court and upon appeal.

4. The United States Court of Appeals for the Tenth Circuit appointed counsel for the respondent pursuant to the Criminal Justice Act of 1964. Leave to proceed in forma pauperis was sought and granted in the Tenth Circuit Court of Appeals.

WHEREFORE, respondent prays that he be allowed to proceed for forma pauperis and to file a response to the Petition for Writ of Certiorari without

payment of fees or costs and for such other and further relief as to the Court shall seem just.

Respectfully submitted,



David W. Duncan, #4574
Attorney for Respondent
1130 Main Avenue
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(303) 259-3000

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No. 82-660

UNITED STATES OF AMERICA,

Petitioner

Vs.

HARRISON P. CRONIC,

Respondent

AFFIDAVIT OF TIMELY FILING

I, John N. Crudup, first being duly sworn according to law, depose and state the following:

-1-

I am a member in good standing with the Georgia Bar Association.

-2-

I was admitted to practice before the Supreme Court of the United States on October 22, 1962.

-3-

To my personal knowledge and in my presence, Harrison P. Cronic mailed, on November 29, 1982, to the Supreme Court of the United States, 1 First Street, N.E., Washington, D.C. 20543, with first class postage prepaid, his Responsive Brief To The Petition For Writ Of Certiorari, by depositing a copy of the same into the United States Mail at Gainesville, Georgia 30501.

This satisfies the requirements for timely filing under Rule 28(.2) of the Rules of the Supreme Court of the United States.

JOHN N. CRUDUP
Attorney at Law
207 Jackson Building
Gainesville, Georgia 30501

Sworn to and subscribed
before me this 29 day
of November, 1982.

NOTARY PUBLIC

Notary Public, Georgia, State at Large
My Commission Expires April 28, 1985

NO. 82-660

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

UNITED STATES OF AMERICA,

Petitioner

v.

HARRISON P. CRONIC,

Respondent

RESPONSIVE BRIEF TO THE PETITION FOR WRIT OF CERTIORARI

HARRISON P. CRONIC
Pro Se
621 Dixon Drive
Gainesville, GA 30501

QUESTIONS FOR REVIEW

I.

IS THE SIXTH AMENDMENT REQUIREMENT OF EFFECTIVE ASSISTANCE OF COUNSEL APPLICABLE TO A DEFENSE COUNSEL WHO FAILS TO ADEQUATELY INVESTIGATE OR OTHERWISE COMPLETELY PERFORM DEFENSE FUNCTIONS AT EITHER TRIAL OR SENTENCING.

A. DOES INVOKING THE SIXTH AMENDMENT UNDER THE ABOVE CIRCUMSTANCES REQUIRE A PREVIOUS DEMONSTRATION BY THE DEFENDANT THAT COUNSEL'S ACTIONS, OR LACK THEREOF, ADVERSELY AFFECTED THE DEFENDANT'S TRIAL.

B. IF THIS CONDITION IS A PREQUISITE TO INVOLVING A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL, MUST PREJUDICE BE SHOWN.

C. IF SO, DOES THIS BURDEN REST UPON THE DEFENDANT OR GOVERNMENT.

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STATEMENT OF THE CASE

Subsequent to an investigation of approximately "five years duration" (United States of America v. Harrison P. Cronic, 675 F.2d 1126, at 1127, 1128, (10th Cir. 1980), and the presentation of "literally thousands of documents" (United States of America v. Cronic, Supra, at 1128), presented to four successive grand juries in 1977, 1978, 1979, and 1980,[1] Harrison P. Cronic, Wylie C. Merritt, and Carolyn S. Cummings were indicted in the United States District Court for the Western District of Oklahoma on February 5, 1980, on thirteen counts of mail fraud and the unlawful use of a fictious name in violation of 18 U.S.C.A. Section 1341 and 1342.

Cronic, upon being notified of this indictment via a long distance call by his attorney, Arnold D. Levine, and, subsequent to arrangements made by Levine, voluntarily surrendered himself to the U. S. Marshall's office in Tampa, Florida, on February 12, 1980. On February 15, 1980, Harrison P. Cronic and Carolyn S. Cummings appeared in U. S. District Court, Oklahoma City, Oklahoma, for arraignment with their counsel, Levine, who indicated at this hearing, "rather authoritatively" (Tr. Motion to Withdraw, page 4, lines 8-10) that there was no conflict between representing both Cronic and Cummings. During the insuing months Levine filed in behalf of his clients, Cronic and Cummings, 21 different motions, totalling 54 pages. However, on June 2, 1980, Levine filed in the U. S. District Court, Western District of Oklahoma, a Motion for Leave to Withdraw as counsel for Harrison P. Cronic, alleging that "an irreconciliable conflict" of interest existed between Cronic and Cummings, and stated in his Reply to Motion Filed by Harrison P. Cronic that Cronic had never "imparted any confidential

[1]Defendant's Motion for Discovery of Matters Pertaining to the Grand Jury, filed by Arnold D. Levine.

information to the undersigned (Levine) or information detrimental to Mr. Cronic in connection with his positions herein".[2]

Cronic resisted these Motions by Levine in his pro se Motion to Deny the Withdrawal of Mr. Arnold D. Levine, as counsel, for Harrison P. Cronic,[3] in which he disputed the allegation that he had not discussed the case with Levine as his counsel,[4] and stated that "information imparted to him (Levine) on a client attorney basis may now be used against him in Cummings' interest". Cronic simultantiously asked the Court either to deny Levine's Motion or compel Levine to withdraw as counsel for Cummings as well. Subsequently the District Court held a hearing regarding this question of June 12, 1980. At this hearing, in which Levine was represented by an associate Herbert M. Berkowitz, it was determined that the issue could not be resolved without the personal presence of Levine. Therefore, the Court ordered a second hearing be held on June 19, 1980, in which Levine himself was ordered to appear. At this hearing, in which Cronic was compelled to cross examine his former attorney without benefit of counsel (Tr. Motion to Withdraw, page 5, lines 20-25, page 6, lines 1-13)[5] Cronic demonstrated that Levine's real reason for

[2]Levine had continuously represented Cronic in all legal matters since 1975. Levine, had, additionally, represented Cronic on several occasions in 1974, (Pro Se Opening Brief for Apoellant, page 3).

[3]Hereinafter abbreviated as "Motion In Opposition".

[4]Given these set of facts, one would have to assume that Levine failed to speak with either Cronic or Cummings concerning this indictment for almost four months. (From February 12, 1980, when Cronic appeared with Levine in Tampa, Florida, to surrender himself, until June 2, 1980, the date of the Motion to Withdraw filed by Levine.

[5]Because of the ambiguity of the District Court's Order of June 12, 1980, regarding provisional appointment of counsel, Cronic was required to cross examine his former attorney, Levine, without benefit of counsel in violation of both the Sixth and 14th Amendments. (Cronic had telephonically spoken with the provisionally appointed counsel Colston on June 12, 1980, and had been told by Colston that it was pointless to discuss the case until such time as the Court ruled on Levine's Motion to Withdraw).

withdrawing as counsel for Cronic was over non-payment of fees,[6] and that the conflict of interest question was simply a permissible shield with which to conceal his (Levine's) true purpose.[7] The Court, itself, seemed to recognize this ploy of Levines' when it stated "it's ironic that the letter you wrote him about the fee told him you were going to withdraw if he didn't pay it came about the time you found out you were...he, attached that to his response here" (Tr. Motion to With, page 4, line 25; page 5, lines 1-3). The Court referred to Cronic's Motion in Opposition, Exhibit No. 1, attached to his Motion in Opposition, (a letter written to Cronic by Levine on April 2, 1980), which stated "if I do not receive $25,000 by Friday,

[6]This pro se Motion filed by Cronic caused some degree of misunderstanding by the 10th Circuit wherein the Court viewed Cronic's request for a more experienced counsel, (and the District Court's response that if Cronic wanted an attorney of his own choosing he should hire one) combined with Cronic's "professed ability" to come up with $350,000 to reimburse a defrauded bank, after he had been convicted, (United States of America v. Cronic, supra, at 1129,F.N.2) and Cronic's declared indigency, after stating that it was unreasonable of Cronic's retained counsel, to believe he would not be paid in full, as somehow being conflicting.

The Appellate Court failed to take note that Cronic always maintained,and the District Court recognized,that Cronic was relying upon two wealthy aunts not himself (Tr. of Sentencing, page 3, lines 15-22; page 8, line 4) to provide the funds for any payment to the bank. Cronic never agreed that a figure of $350,000 was owed to the bank (Supplemental Record on Appeal,[8] page 30, item 63) because the bank would never allow an audit, (SRA, pages 17, 19, item nos. 39, 40, 41, respectively, pages 111-124),and Cronic had stated earlier in his pro se Motion in Opposition that his "aunt has, for the most part paid all legal fees for the undersigned to Mr. Levine". Hence, there is no contradiction in these statements. Due to the age, family opposition, and severe medical conditions of both aunts, neither was subsequently able to provide Cronic with defense funds.

[7]This is especially significant in that Levine had told Cronic "I have my own ways to collect (Cronic's Motion in Opposition) during a discussion with Cronic over fees on June 3, 1980. Thus, Levine was still continuing to discuss this case with Cronic even though he had already made his decision to withdraw.

[8]Hereinafter abbreviated as "SRA". This constitutes Cronic's Motion For New Trial Based on Newly Discovered Evidence, pages 2-173.

April 4, 1980, I will make a Motion to Withdraw". After a rather heated exchange between Cronic and Levine (Tr. Motion to Withdraw, page 13, lines 11-25; page 14, lines 1-13), the Court allowed Levine to withdraw as counsel for Cronic and continue to represent Cummings (Tr. Motion to Withdraw, page 14, lines 7-13)[9] At the conclusion of the hearing, the government indicated that Levine had previously commenced plea negotiations in Cummings' behalf, even before being released as attorney for Cronic (Tr. Motion to Withdraw, page 20, lines 11-22). It was at this hearing that Cronic first objected to the appointment by the Court of Chris Colston as his court appointed counsel, on the grounds that Colston was a specialist in real estate law (Tr. Motion to Withdraw, page 23, lines 10-14), with no experience in Criminal law (United States of America v. Cronic, supra, at 1129, F.N.2),[10] and no trial experience (Tr. of Proceedings, page 92, lines 12-14).

[9]The position taken by the U. S. District Court and the United States Court of Appeals for the Tenth Circuit on this issue indicates that both courts required Cronic to demonstrate a showing of prejudice in Levine's continued representation of Cummings. The requirement by these courts of the demonstration of prejudice is completely contrary to established case law. (T.C. Theatre Corp. v. Warner Bros. Pictures, 113 F. Supp. 265, Richardson v. Hamilton, Int'l Corp., 469 F.2d 1382, Cert. denied 411 U.S. 986, Emle Inds. Inc. v. Patentex, Ind., 478 F.2d 562, Waters v. Western Co. of North America, 436 F.2d 1072). See also Canon No. 4, EC-4-1-4-4, 4-5, 4-6, Dr. 4-101(A), Dr. 4-1-1(B)(1)(2), Canon 9, EC 9-1, EC 9-2, EC 9-6). It would appear to be rather a far fetched notion that an attorney who represented Cronic, Cummings, and the corporation involved (Skyproof Mfg., Inc.) and, who had previous to this indictment, represented Cronic for five years, has never been entrusted with any information of any type which may be detrimental in some manner to his former client (Cronic). Based on Levine's long association with Cronic, he should have been compelled to withdraw as attorney for both Cronic and Cummings, upon a showing of adverse interest, regardless of whether he did or did not speak with Cronic concerning any matters directly related to the indictment of February 5, 1980.

[10]Subsequent to Cronic's trial it was determined that Colston had never represented anyone in a federal criminal trial.

Cronic, additionally at this time, raised the insufficiency of time for his court appointed counsel (Colston) to prepare for trial stating "I don't feel like that I could possibly get a fair defense giving my attorney one or two weeks to prepare for this when Mr. Levine has had the advantage of a five year investigation, all the documentations, a complete review of all of that prior to my testimony before a federal grand jury in Tampa," (Tr. Motion to Withdraw, page 15, lines 10-15). The trial had previously been schedule to begin on June 30, 1980, (Tr. Motion to Withdraw, page 17, lines 17-19), but the Court granted a continuance until July 14, 1980. (Tr. Motion to Withdraw, page 19, lines 9-11). Thus, from the date of Colston's confirmed appointment on June 19, 1980, until the date the trial began on July 15, 1980, was a period of 25 days.[11] Levine, "a former United States Attorney, and practiced in federal court for twenty years" (Tr. Motion to Withdraw, page 3, lines 4-5), recognized the inherent difficulty the Court was placing upon Colston in relation to the short amount of time for defense preparation allowed prior to trial when he stated "I would respectively submit to your honor that if defense counsel were to devote all of his working days, he might be able to be ready in 30 days, might be, if he were to devote all of his time to this case" (Tr. Motion to Withdraw, page 18, lines 15-18). Levine further stated that defense counsel would have to review approximately two feet of material" (Tr. Motion to Withdraw, page 18, lines 7-9).[12]

[11]Disregarding the long weekend of July 4, 1980, in which all private and governmental offices were closed, Colston had at most 18 to 22 days to prepare for trial, assuming that he worked seven days a week and devoted his entire time to nothing but the Cronic case.

[12]Cronic determined, by using mathematical calculations, that it would take 72.91 days to read two feet of material reading

(F.N. 12 continued on page 6)

Colston never made any further request for an extention of time although he himself felt that he had inadequate time to prepare. Moreover, Dr. Virginia A. Boyle, Ph.D., Licensed Applied Psychologist, stated prior to trial that (Colston) "...In feeling insecure... and under the severe time constraints...likely did not feel competent in representing this case.....(but) it might have been difficult for him to admit his weakness in this instance, and, as such, could not bring himself to withdraw from your case...This could account for the initability and defensiveness he showed toward you" (SRA, page 26, 27, 28, 29, Item Nos. 56, 58, 59, 61, respectively, pages 125-132).[13]

Additionally, Colston sought and was provided funds by the Court to hire an investigator, (Tr. Motion to Withdraw, page 21, lines 6-25), and an accountant (Tr. Motion to Withdraw, page 22, lines 1-4) for trial preparation. Counsel made no use of the funds and never conducted an investigation of the fraud charged.

12 (cont'd) eight hours per day or 36.45 days reading sixteen hours per day. Calculations were based on the following facts:

A. Two feet of material was determined to equal 15,312 pages (Volumes 426, 427, 428, 429, and 430, Federal Reporter 2d series, equals almost one foot exactly or 7656 pages. This was doubled to equal the two feet referred to, or 15,312 pages).
B. There are 60 minutes per hour or 480 minutes per day, an average person reads at approximately 300 words per minute or 144,000 words per day (480x300).
C. In the volumes referred to in (A), there are an average of 686 words per page.
D. By dividing the number of words per day (B) by the number of words per page (6), one finds that an average person would read 210 pages per day in an eight hour period. (Although all government documents in its two foot stack will not be composed of this many words per page, it was felt that this would equalize[4] by the fact that additionally time would be required by counsel to absorb and carefully review same. Thus, these two variances would equalize each other).
E. By dividing the total number of pages 15,312(A) by the number of pages read per day 210(D), it is determined that it would take 72.91 days reading eight hours per day or 36.45 days reading 16 hours per day to read the government's two feet of material. This does not allow for trial preparation itself, merely the reading of documents. (Pro se Respondent Brief of Appellant, pages 13-14).

13 A violation of the ABA Standards relating to the Defense Function 3.1(A) (1971 Approved).

SRA, pages 24, 25, 26, 173, Item Nos. 49 - 55, respectively). In an effort to minimize and ameliorate these actions by Colston, the government, in its Petition for Rehearing and Suggestions For Rehearing En Banc attached an affidavit of Mr. Ryland Rivas avering that he "had extensive experience in the practice of criminal law" and that he "assisted Mr. Chris Colston in his preparation of defenses for Harrison Cronic and was present during all stages in the proceedings to assist Mr. Colston with the preparation and drafting of motions, examination of witnesses and examination of all evidence available to Mr. Colston."[14]

This statement by Rivas does not lessen the impact of Colston's inadequate and indifferent representation but rather compounds and magnifies the impact of such representation when participated in by a person who had had "extensive experience in the practice of criminal law." The gross nonfeasance by Colston and Rivas is underscored by the fact that neither consulted with Cronic to any substantive degree during the proceedings except for approximately four hours on July 13, 1990, the day before trial began.[15] (SRA, page 28, Item 60).

Most importantly, however, neither of these attorneys conducted any factual investigation of the fraud charges.[16]

[14]This affidavit attached to the government's Petition for Rehearing is not allowed under the Federal Rules of Common Appellate Procedure, Rule 40, 28 U.S.C.A. Permission for filing such an affidavit was neither sought by the government nor granted by the Court. See also (Sound Ship Bldg. Corp. v. Bethelhem Steel Co., Inc.) (C.A.N.J. 1976, 533 F.2d 96, Cert. denied 429 U.S. 860).

[15]A violation of the ABA Standards relating to the Defense Function 3.8 and 5.2(B) (1971 Approved).

[16]Thus both Colston and Rivas grossly violated the ABA Standards relating to the Defense Function (1971, Approved) 4.1 which states "it is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and explore all answers leading to facts relevant to guilt and degree of guilt or penalty. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or his stated desire to plead guilty."

Cronic, himself, not his attorneys, located, subsequent to the trial and sentencing, documents in the U. S. District Court for the Eastern District of Texas,(SRA, pages 3, 23, 39, 55) which completely contradict the testimony of two key government witnesses, Messr. Heiple and Bumgarner, that the bank had only been repaid $9,000 (of the claimed $484,000 loss),(Tr. of Proceedings, page 179, lines 2-5, page 438, lines 7-8), that the bank was "hanging on its fingernails"[17] (Tr. of Proceedings, page 174, line 21), and that Cronic was always considered by them, and others, to be the real and true owner of Skyproof Mfg., Inc., the corporation in question, (Tr. of Proceedings, page 186, lines 22-24, page 318, lines 1-4, page 373, lines 5-25, page 374, lines 1-7, page 436, lines 11-13. SRA, page 7, Item Nos. 16, 17, page 15, Item No. 35, page 16, Item No. 36, page 17, Item No. 37, see also SRA, pages 45-56, 73, 96-102, 142-167). The latter statement is extremely crucial in that the government itself acknowledges, in its Petition for Writ of Certiorari that the conviction rested "principally on the credibility of the testimony of his two co-defendants and several other witnesses" (Page 19, F.N. 11, Petition for Cert.).

In fact, there was no documentary evidence of any type connecting Cronic with the alleged crimes other than the heretofore described testimony. Thusly, anything which would attack the credibility of these witnesses was of paramount importance. The evidence discovered by Cronic was more than cumulative or impeaching and his attorneys Colston and Rivas, could not effectively cross-examine these witnesses as to the fraud charged because they did not have the previously described facts

[17]The bank, in fact, had a reserve for bad debt losses of only $20,146.13 during the fourth quarter of 1975, the period in question. In fact, the bank had actually deceased its reserve for bad debt losses by over 100% during the period in question. (Pro Se Opening Brief for Appellant, Appendix, Exhibit No. 2).

upon which to vigorously challenge statements made by these individuals. Furthermore, and most dramatically, these documents strike to the very core of the guilt or innocence of Cronic in that statements made by government witnesses as to their belief of ownership of the corporation involved was completed contradicted by documents which they themselves had originated and prepared. (SRA, pages 3-18, Item Nos. 4-42) Thus, there is no doubt that counsel for Cronic failed to properly investigate "the facts relevant to guilt and degree of guilt or penalty."[18] Hence, the attorneys, Colston and Rivas, by failing to conduct a factual investigation, and thereby violating the most elemental requirement of effective advocacy of a client's interest, did not meet the criteria that attorneys act within the "range of competence demanded of attorney's in criminal cases" (McMann v. Richardson, 397 U.S. 759, (1970) at 772.

Furthermore, had a proper investigation been conducted by Cronic's attorneys prior to the trial, this evidence would have been extremely important in attacking the credibility of testimony given by Merritt and Cummings, (SRA, pages 18-23, items Nos. 42-44, pages 39-110) in that it further demonstrates that past actions of these individuals as to the owner of the corporation at issue was completely different from their testimony at trial.

During the course of the trial Cronic stated on several occasions that his court appointed counsel was doing a good job. (Tr. of Proceedings, page 568, Lines 1-12, page 571, lines 17-25). This statement did not reflect Cronic's true opinion, but was done at the specific instruction of Dr. Virginia A. Boyle, Ph.D., Licensed Applied Psychologist, who had advised Cronic P-R-I-O-R to the trial that because of court-appointed counsels irritiability and defensiveness displayed toward Cronic that he (Cronic) could best improve the situation by "...praise the work he did

[18] ABA Standards relating to the Defense Function 4.1 (1971 Approved).

as much as possible and particularly in public" (SRA, pages 27-28, Item No. 59, pages 127-132).[19] This is precisely what Cronic did, since the trial court had refused Cronic's prior request to provide him with more qualified counsel (Tr. Motion to Withdraw, page 23, lines 8-23).

Additionally, this failure by counsel resulted in Cronic not being able to rebut factual information used at sentencing (Pro Se Opening Brief of Appellant, pages 17-26) which resulted in Cronic being sentenced on incorrect and misleading information. (Pro Se Opening Brief of Appellant, pages 27-30).[20] Court appointed counsel also had a conflict of interest which he failed to inform the court about, (SRA, page 29, item 62, page 133),[21] and in fact there is a serious question as to whether Colston and Rivas worked adversely to Cronic, and his specific instructions, when in a meeting on August 6, 1980, with Judge Eubanks, Mr. Heiple and others Cronic's counsel agreed to accept the figure of $350,000.00 owed the bank as being correct, without the right to review bank records, a direct contravention of specific instructions given to Colston by Cronic the previous night. (SRA, page 30, Item No. 63, page 118, Exhibit No. 28. See also Pro Se Opening Brief for Appellant, page 17, F.N. 1).[22] On July 17, 1980, the jury found defendant Cronic guilty on eleven counts (1, 4-13) and not

[19] However, even if Cronic had made these statements of his own volition, and not on the advise of a trained and licensed psychologist of what importance are they? Is the government suggesting that the level of acceptable performance of a court appointed counsel is to be determined by the opinion of an untrained laymen? How absurd.

[20] A violation of the ABA Standards Relating to the Defense Function 8.1(B)(1971 Approved).

[21] A violation of the ABA Standards Relating to the Defense Function 3.5(1971 Approved).

[22] A violation of the ABA Standards Relating to the Defense Function 1.1(B)(D), 1.6 (1971 Approved).

guilty of the remaining two counts (2, 3) (Tr. of Proceedings, 601, lines 8-17). Pursuant to the Federal Rules of Criminal Procedure, Rule 33, 18 U.S.C.A. Cronic filed on March 11, 1981, a Motion for New Trial Based on Newly Discovered Evidence in the United States District Court for the Western District of Oklahoma. This motion was denied one day later on March 12, 1982, by U.S. District Judge Luther B. Eubanks on the procedural ground that since an appeal was pending in the Cronic case the motion could only be granted upon remand of the case.[23] Cronic objected to this holding by the District Court on the grounds that it was an improper reading of Rule 33, and filed on April 17, 1981, with the U. S. Court of Appeals, for the Tenth Circuit, a Motion to Reverse the District Court's Denial of a New Trial, and asked that the Appeals Court "hold in abeyance any further action in this case until a hearing, and a determination of that hearing, is completed by the District Court for the Western District of Oklahome". On May 7, 1981, the Appellate Court denied Cronic's Motion and ordered that the Motion for New Trial Based On Newly Discovered Evidence be "submitted to the Court together with briefs". It is inferred from this ruling that the Tenth Circuit concluded upon a review of Cronic's Motion (SRA, page 1-173) that a hearing was unnecessary at the District Court level since the Newly Discovered Evidence was of sufficient documentary strength as to not require testimony, and therefore the Appellate Court, itself, was empowered to rule upon the issues of fact contained in Cronic's Motion for New Trial.

[23] F.R.C.P., Rule 33, 18 U.S.C.A. allows the District Court to conduct evidentary hearings upon a Motion For New Trial Based On Newly Discovered Evidence, but it may not grant, if so inclined, said Motion unless the Appellate Court first remands the case back to the District Court; a point the District Court failed to properly distinguish. Thus the District Court denied Cronic's Motion on procedural grounds and not on the merits of the Motion itself.

Subsequent to reviewing the record on appeal and the supplemental record on appeal ("SRA") containing Cronic's Motion For New Trial Based On Newly Discovered Evidence, where the issue of ineffective assistance of counsel was properly raised for the first time, the 10th Circuit Court of Appeals reversed Cronic's conviction on ineffective assistance of counsel, stating that "when circumstances hamper a given lawyer's preparation of a defendant's case, the defendant need not show specified errors in the conduct of his defense in order to show ineffective assistance of counsel... This is an eminently reasonable rule, for there is no way an appellate court can say precisely how a given case would have been handled by a reasonably diligent and properly prepared lawyer. The prejudice from lack of preparation and experience cannot be nicely weighed". (United States of America v. Cronic, supra, at 1128.) The court further added that "there was no conflict between its prior decisions in United States v. King, 664 F.2d 1171 (10th Cir. 1981); United States v. Golub, 638 F.2d 185 (10th Cir. 1980) and the Supreme Court's opinion in United States v. Morrison, 449 U.S. 361 (1981) holding that "nothing in Morrison suggests that reversal of a conviction may not be 'relief appropriate in the circumstances to assure the defendant the effective assistance of counsel and a fair trial'"(quoting from Morrison, supra, at 365). Thus, the Tenth Circuit's approach to Sixth Amendment violations of ineffective assistance of counsel, and the issue of prejudice is to apply a harmless beyond a reasonable doubt criteria, once the defendant has met the initial burden of showing that defense counsel's actions did not meet the "reasonable diligence and skill test", United States of America v. Poterfield, 624 F.2d 122, at 125 (10th Cir. 1980) with the burden being placed upon the government.

On July 16, 1982, the Tenth Circuit denied the government's Petition For Rehearing And Suggestion For Rehearing En Banc.

On October 14, 1982, a Writ of Certiorari was filed by Rex E. Lee, Solicitor General, in the Supreme Court of the United States.

ARGUMENT

Cronic, while vigorously disagreeing with the position taken by the government vis-a-vi the decision in the instant case by the Tenth Circuit Court of Appeals, does believe that the issue contained in the Question for Review presents a very significant area of criminal law, which, because of the divergent ruling of the various Circuits, requires resolution by this Court. Additionally, the case at bar provides both the necessary documentary evidence and the requisite set of factual circumstances necessary for a clear and concise ruling on this question.

This Court held in McMann v. Richardson, 397 U.S. 759 at 77 (1970), that "defendants facing felony charges are entitled to the effective assistance of counsel...within the competence demanded of attorneys in criminal cases."

The Court further added: "Beyond this we think the matter, for the most part, should be left to the good sense and discretion of the trial courts with the admonition that if the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel, and that judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts." (Emphasis added).

Thus, while adopting an objective standard to be applied to the claim of ineffective assistance of counsel,[24] the Court has

[24]All circuits except the Second Circuit United States v. Williams, 575 F.2d 388, at 393 (1978) have adopted this objective standard criteria as outlined in McMann, supra, First Circuit; United States v. Bosch, 584 F.2d 1113 at 1121 (1978); Third Circuit: Moore v. United States, 432 F.2d 730 at 736 (1970) (en banc); Fourth Circuit: Marzullo v. Maryland, 561 F.2d 540 at 543 (1977); Fifth Circuit: Akridge v. Hooper, 545 F.2d 457 at 459 (1977); Sixth Circuit: Beasley v. United States, 491 F.2d 687 at 696 (1974). (F.N. 24 continued on page 16)

declined up until the present time, to establish any type of fundamental guidelines whereby ineffective assistance of counsel may be measured. The entire issue, along with all attendant secondary questions, i.e., prejudice, of what constitutes a minimum standard of performance by a criminal defense attorney has been left to the lower courts to resolve (Accord Tollett v. Henderson, 411 U.S. 258 at 266 (1973).

Unfortunately, the lower courts, far from having resolved this question, have become a vertible kalidescope of conflicting opinions both intra and inter Circuit.

The pivotal question among the Circuits relating to a claim of ineffective assistance is whether, once "a failure to perform some duty, as essential as the duty of investigation, owed by a defense attorney to his client" (McQueen v. Swenson, 498 F.2d 207 at 218) has been established, is that constitutional violation, in and of itself, sufficient to require relief. If not, is the burden upon the defendant or government to demonstrate prejudice, and if the defendant to what degree must this be evident, and may the government then defeat this showing by a harmless error approach. There are recognizable, institutionalized areas of ineffective assistance, such as the failure to appoint counsel, Gideon v. Wainwright, 373 U.S. 335 (1963)[25] interference in client attorney relationship (Geders v. United States, 425 U.S. 80 (1976), or the tardy appointment of counsel which restricts the attorney's ability to represent his/her client due to lack of time to properly prepare a defense, (Powell v. Alabama, 287 U.S. 55 at 71), which, by their very existence, require a catergorical approach to the violation involved and are on their very face presumptively harmful.

24 (con'd) Seventh Circuit: United States ex rel. Williams v. Twomey, 510 F.2d 634, at 640 (1975); Eighth Circuit: United States v. Easter, 539 F.2d 663 at 666 (1976), Ninth Circuit: Cooper v. Fitzharris, 586 F.2d 1325 at 1328 (1978) (en banc), Tenth Circuit: Dyer, v. Crisp, 613 F.2d 275, at 278 (1980) (en banc); D.C. Circuit: United States v. DeCoster, 487 F.2d 1197 at 1202 (1973).

25 One could reasonably argue that there is no substantial difference in the government appointing no counsel and appointing an unqualified, ineffective one.

There is presently, however, among the Circuits, no agreement as to the degree of prejudice which a defendant must evidence, absent institutionalized, categorical violations, in order to prevail on a Sixth Amendment challenge in this area. Only one Circuit, the Sixth, requires no showing of specific prejudice resulting from defense counsel's representation (Beasley v. United States) supra, holding in that decision that "Harmless error tests do not apply in regard to the deprivation of a procedural right so fundamental as to the effective assistance of counsel" (Id at 696). This ruling by the Sixth Circuit may be subject to change since United States v. Morrison, 449 U.S. 361 (1981). In Morrison, the Court addressed the issue of prejudice within a Sixth Amendment framework by holding that "the constitutional infringement idenified has had or threatens some adverse effort upon the effectiveness of counsel's representation or has produced some other prejudice to the defense" Id. at 365. A reading of the SRA (Supplemental Record on Appeal) amply authentiates that the Tenth Circuit's reversal of Cronic's conviction on ineffective assistance of counsel is completely compatable with[26] the Supreme Court's decision in Morrison.

This does not imply that the defendant must demonstrate prejudice to the extent that "the defendant would have been acquitted but for counsel's blunders". (Cooper v. Fitzharris, 586 F.2d 1325, at 1333 (1978) 9th Cir. (en banc). The defendant to obtain "relief on the basis of a claim of ineffective assistance of counsel must generally make a showing of prejudice, this prejudice requirement is satisfied by demonstrating that but for his counsel's ineffectiveness his trial, but not necessarily its outcome, would have been altered in a way helpful to him" (Washington v. Strickland, 637 F.2d 879 at 902 (5th Cir.) (1982).

[26] Ibid. This brief for a detailed description of the prejudice resulting from the failure by Cronic's court appointed counsel to conduct a factual investigation prior to trial, and the insufficient amount of time allowed for trial preparation. Pages 4-10.

The Fifth Circuit, in Washington, adopted an approach previously held in three circuits, the Third, Eighth, and D. C. The Third Circuit in United States ex rel. Green v. Rundle, 434 F.2d 1112, at 1115 (2nd Cir. 1970) held that the defendant bears the limited responsibility for demonstrating that "the missing evidence (not made available to the defendant because of ineffective assistance) would be helpful". The Third Curcuit, further clarified the issue, in United States ex rel. Johnson v. Johnson, 531 F.2d 169, at 177 (3rd Cir.) (1976), when it held that the state may avoid relief sought by the defendant,even though the initial burden has been met by the accused, by a showing that the alleged failure of counsel was "harmless beyond a reasonable doubt".The Eighth Circuit in McQueen v. Swenson, 498 F.2d 207, at 220 (8th Cir. 1974) adopted virtually the identical position taken by United States ex rel. Green v. Rundle, supra, and United States ex rel. Johnson v. Johnson, supra, when it stated that "the petitioner must shoulder an initial burden of showing the existence of admissible evidence which could have been uncovered by reasonable investigation and which would have proved helpful to the defendant... Once this showing is made, a new trial is warranted unless... such evidence was harmless beyond a reasonable doubt." (Burden then shifting to the government). In United States v. Wood, 628 F.2d 554 at 559 (D.C. Cir. 1980) (en banc), the D.C. Circuit clarified its fractous decision in United States v. De Coster, 624 F.2d 196 (D.C. Cir. 1979) (en banc)[27] when it held in Wood that a defendant is required to "establish some basis for believing that a different kind of preparation would have resulted in the presentation of a contrary line of testimony for the jury's

[27]A close scrunity of the D.C. Circuit's opinion in the Decoster case indicates that it never required the defendant to demonstrate prejudice to the extent that it would have affected the outcome of the trial. In fact a majority of the Court only required that "beneficial material facts" Id. at 232 would have changed not the outcome, but the "character" of the proceedings. The proof of this is in the D. C. Circuit's opinion in United States v. Wood, supra.

consideration." The Ninth Circuit also reflected this position in Cooper v. Fitzharris, 586 F.2d 1325 at 1331, (9th Cir. 1978) (en banc) when it addressed the issue of prejudice in the following terms: "when the claim of ineffective assistance rests upon specific acts and omissions of counsel at trial, as it does in this case, relief will be granted only if it appears that the defendant was prejudiced by counsel's conduct". However, in Cooper, the Nineth Circuit stipulated two significant provisions: (1) "If counsel is charged with multiple errors at trial, absence of prejudice is not established by demonstrating that no single error considered alone significantly impaired the defense function prejudice may result from the cumulative impact of multiple deficiences. (2) Finally, the requirement that prejudice appear does not mean that relief is available only if the defendant would have been acquiteed." Id. at 1333. Of the remaining Circuits, the First is uncommitted holding in United States v. Bosch, 584 F.2d 1113, at 1123, (Cir. 1978) that it was undecided as to "whether deprivation of effective assistance can ever constitute harmless error". Although the Second Circuit continues to adhere to the "farce and mockery" test for measuring the conduct of a defense counsel, the only remaining Curcuit to do so, (United States v. Williams, 575 F.2d 388, at 393 (2nd Cir.) (1978), it has in United States v. Aulet, 618 F.2d 182 (2nd Cir. 1980) and United States ex rel. Bradley v. McMann, 423 F.2d 656 (2nd Cir. 1970) indicated a strong tendency to require the defendant to demonstrate prejudice in order to obtain relief. The Fourth Circuit reached a similar conclusion in Coles v. Peyton, 389 F.2d 224 at 226 (4th Cir.) (1968) when it held that an "Omission or failure to abide by these requirements [of prompt appointment of counsel, adequate opportunity to prepare a defense, adequate consultation, and appropriate investigation] constitutes a denial of effective representation of counsel unless the state, on which is cast the burden of proof once a violation of these

precepts is shown, can establish a lack of prejudice thereby." The Seventh has as yet, no definitive opinion, and waives between the position in United States ex rel. Healey v. Cannon, 553 F.2d 1052 at 1057 (7th Cir.) (1977) that "the harmless error doctrine is patently inapplicable to the claimed deprivation of a due process right so fundamental as the effective assistance of counsel," and its position in United States v. Ingram, 477 F.2d 236 (7th Cir.) (1973) wherein it concluded that a claim of ineffective assistance may not prevail where no prejudice was demonstrated.

The Tenth Circuit in United States v. Poterfield, (624 F.2d 122) (10th Cir) (1980) stated that it is not accurate, however, to conclude that "prejudice" is a second tier in the test of competency. Reasonable diligence is the test. It would be a mockery in that case to say that the defendant was clearly guilty and that the incompetence of counsel made no difference. Where, as here, the imcompetence of counsel is pervasive, the defendant ought not to be required to prove prejudice on top of inadequacy. The burden should be on the government to establish the lack of prejudice." Id at 125. (Emphasis added). Hence, the Tenth Circuit, in essence, has adopted a harmless error criteria with the burden placed upon the government.

The application of Sixth Amendment safeguards as applied in the Cronic case,[28] citing United States of America v. King, supra, and United States of America v. Golub, supra, are especially compatible with the decision in the Fourth Circuit (Coles v. Peyton, supra, [29] and the Nineth Circuit (Cooper v. Fitzharris, supra, at 1333[30] citing the two significant provisions).

[28] United States of America v. Harrison P. Cronic, supra. at 1129.

[29] Ibid. Page 17.

[30] Ibid. Page 17.

An analysis of the Cronic case (with special emphasis upon the SRA in which Cronic substantiated his claim of ineffective assistance)[31] indicates that under any of the various and conflicting tests currently followed by the twelve Circuits, from the most stringent in the D. C. Circuit (United States v. DeCoster, supra), to the most liberal in the Sixth Circuit (United States v. Beasley, supra, Cronic meets any standard presently required, up to and including the likelihood that counsel's ineffectiveness would have affected the judgment of the jury.[32]

CONCLUSION

Although the judgment of the United States Court of Appeals, For the Tenth Circuit should be affirmed in the Cronic case, it would be greatly beneficial to all Federal Circuits if this Court should express itself on this very timely issue.

Respectfully submitted,

HARRISON P. CRONIC, Respondent
Pro Se
621 Dixon Drive
Gainesville, GA 30501

[31] Ibid.
Pages 2-173

[32] Dr. Nancy Lyons, University of Georgia, Department of Statistics and Computer Science, using the Binomial Probability Distribution Formula $\left(\sum_{x}^{n}\binom{N}{x}P^{x}(1-P)^{N-x}\right)$ determent that the probability with six or more jurors changing their minds, had they known of the payment to the bank (SRA) would have been 61.3%.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NO. 82-660

UNITED STATES OF AMERICA,

Petitioner

v.

HARRISON P. CRONIC,

Respondent

CERTIFICATE OF SERVICE

STATE OF GEORGIA
COUNTY OF HALL

I, Harrison P. Cronic, after being duly sworn, deposes and says pursuant to Rule 28.31.5(c) of this Court he served the within Responsive Brief to Petition For Writ of Certiorari on the following parties by enclosing a copy thereof in an envelope, first class postage prepaid, addressed to:

(1) Rex E. Lee
Solicitor General

D. Lowell Jensen
Assistant Attorney General

Edwin S. Kneedler
Assistant to the Solicitor General

Department of Justice
Room 5614
10th and Constitution Avenue, N. W.
Washington, D. C. 20530

(2) David William Duncan
P. O. Box 179
Durango, CO 81301

and depositing same in the United States mails at Gainesville, Georgia, on the 29th day of Nov., 1982.

HARRISON P. CRONIC, Affiant

Sworn to and subscribed before me
this 29 day of November, 1982.

Evelyn D. Pendley
NOTARY PUBLIC

My Commission expires March 12, 1984

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No. 82-660

RECEIVED
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SUPREME COURT, U.S.

UNITED STATES OF AMERICA,

Petitioner

v.

HARRISON P. CRONIC,

Respondent

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Respondent, Harrison P. Cronic, asks leave to file the attached Responsive Brief to Petition For Writ of Certiorari without prepayment of costs and to proceed in forma pauperis. Respondent has previously been granted leave to proceed in forma pauperis by both the United States District Court, for the Western District of Oklahoma, and the United States Court of Appeals, for the Tenth Circuit. Respondent's Affidavit in Support of this Motion is attached hereto.

AFFIDAVIT

I, Harrison P. Cronic, being first duly sworn according to law, depose and say that I am the respondent in the above entitled case; that in support of my motion to proceed without being required to prepay fees, costs, or give security therefor, states that because of my poverty, I am unable to pay the costs of said case or to give security therefor, and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the costs of proceeding in this court are true:

1. Are you presently employed?

A. No.

2. Have you received within the past twelve months any income from a business, profession, or other form of self-employment, or in the form of rent payments, interests, dividends, or other source?

A. No.

3. Do you own any cash or checking or savings account?

A. No.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

A. No.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

A. None.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

HARRISON P. CRONIC
Affiant

Sworn to and subscribed before me
this 29 day of November, 1982.

Evelyn B Pendley
NOTARY PUBLIC

My Commission expires March 12, 1984

Office Supreme Court, U.S.
FILED
FEB 15 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-660

In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, PETITIONER

v.

HARRISON P. CRONIC

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

REX E. LEE
Solicitor General
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Washington, D. C. 20530
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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-660

UNITED STATES OF AMERICA, PETITIONER

v.

HARRISON P. CRONIC

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

In contending that he received ineffective assistance of counsel at trial, respondent, in his pro se Responsive Brief to the Petition for Writ of Certiorari (at 8-11), places "special emphasis" (*id.* at 19) on material contained in his Motion for a New Trial and exhibits thereto. As respondent concedes (Pro Se Br. 11), however, the new trial motion was denied by the district court without reaching the merits, because the case was then pending on appeal. See Fed. R. Crim. P. 33. As a result, no hearing was held on the new trial motion and the district court made no findings on the allegations contained therein, including those pertaining to defense counsel's asserted failure to investigate a foreclosure sale in Texas or other matters.

The new trial motion and exhibits accompanying it were certified to the court of appeals as part of a Supplemental Record on Appeal, but the court of appeals did not rely on

respondent's specific allegations in the new trial motion or matters in the exhibits in concluding that respondent had been denied effective assistance of counsel. Nor could it properly have done so, because no findings had been made by the district court regarding the substance of respondent's contentions in the motion; whether defense counsel in fact was aware of or investigated the matters respondent mentioned; whether any such lack of awareness or failure to investigate departed substantially from the performance that could have been expected of reasonably competent defense counsel; and whether and in what manner the conduct or outcome of the trial might have been affected had counsel investigated the matters respondent identifies.[1]

The court of appeals instead held (Pet. App. 3a) that it was not necessary for repondent to specify errors by defense counsel in order to establish ineffective assistance of counsel in the circumstances of this case. In so doing, the court

---

[1]The various allegations contained in the separate brief in opposition filed by counsel for respondent (at 3), on which there likewise has not been an evidentiary hearing, also do not support reversal of respondent's conviction. For example, it is irrelevant—in the absence of a showing that counsel was somehow precluded from preparing an adequate defense—that the government's witnesses came from four states and that respondent lived in Florida and Georgia. The fact that defense counsel did not make numerous objections during trial or object to the jury instructions could reflect the exercise of reasonable tactical or legal judgment; it does not in any event support a finding of ineffective assistance of counsel without a showing that there was an objection that reasonably competent defense counsel would have made, and that respondent suffered prejudice as a result of his attorney's failure to make that objection.

The period of time over which the government's investigation was spread and the number of documents produced as a result likewise do not, without more, establish a basis for reversal. There has been no showing that Colston and Rivas were unable to review all relevant materials or, if they did not, the reasons for and consequences of their failure to do so. The same is true with respect to counsel's alleged failure to consult an accountant.

expressly declined to apply the test for ineffective assistance of counsel utilized by the Tenth Circuit: whether counsel failed to exercise " 'the skill, judgment and diligence of a reasonably competent defense attorney' " (Pet. App. 3a, quoting *Dyer* v. *Crisp*, 613 F.2d 275, 278 (en banc), cert. denied, 445 U.S. 945 (1980)). The court accordingly did not identify any act or omission of counsel that it regarded as error, much less find that any such error was of sufficient magnitude that counsel's performance must be held to have departed substantially from the range of competence that reasonably may be expected of defense counsel. Rather, the court concluded that respondent had received ineffective assistance of counsel based solely on defense counsel's having had "only" 25 days to prepare for trial, attorney Colston's lack of prior experience in criminal trials, and the court's own observation that mail fraud trials tend to be complex (Pet. App. 4a-5a)—without any assessment of the complexity of this particular case or whether Colston and his colleague, Rivas, had failed to comprehend it in a manner that had any adverse impact on their representation of respondent.

For the reasons stated in the petition for a writ of certiorari (at 10-17), in the absence of a finding that the factors upon which the court of appeals relied led to a performance by counsel at trial that substantially departed from that which could be expected of reasonably competent defense counsel and that respondent was prejudiced in some manner as a result,[2] there was no basis for concluding that

---

[2]Since the petition for a writ of certiorari was filed in this case, the Fifth Circuit rendered its en banc decision in *Washington* v. *Strickland*, 693 F.2d 1243 (1982). (The panel's opinion in that case was cited in the certiorari petition, at 14.) The en banc court held that in order to obtain relief on collateral attack on the ground of ineffective assistance of counsel, the petitioner must prove that his attorney's acts or omissions caused "actual and substantial disadvantage to the course of his

counsel's performance was constitutionally ineffective. Reversal of the judgment of the court of appeals on this ground would not foreclose later consideration of the more specific allegations of ineffective assistance of counsel raised by respondent in his pro se Responsive Brief or by his attorney in his separate brief in opposition, matters that should be addressed in the first instance by the district court.[3]

---

defense." *Id.* at 1262. Unlike the District of Columbia Circuit in *United States* v. *Decoster*, 624 F.2d 196 (D.C. Cir.) (en banc), cert. denied, 444 U.S. 944 (1979), the court declined to adopt a test that focused on the likelihood that counsel's conduct affected the outcome of the proceedings. 693 F.2d at 1261-1262. It is not clear how significant the difference between these two approaches would be as a practical matter. In any event, there is no need in this case to consider which approach is preferable, because the court of appeals made no finding of prejudice that would satisfy either of these formulations.

[3]Since the petition for a writ of certiorari was filed in this case, a divided panel of the Tenth Circuit vacated its previous opinion in *United States* v. *Golub*, 638 F.2d 185 (1980) (cited in the petition, at 14 n.7, 20 & n.12), and affirmed the conviction in that case. *United States* v. *Golub*, 694 F.2d 207 (10th Cir. 1982). In its latest decision in *Golub*, the court adhered to the approach taken in *United States* v. *King*, 664 F.2d 1171, 1173 (10th Cir. 1981), and the instant case, but, on the facts there presented, rejected the claim that defense counsel had inadequate time to prepare for trial. 694 F.2d at 214-217. Review of the decision below therefore continues to be warranted to correct the erroneous approach taken by the Tenth Circuit in this line of cases.

Accordingly, it is respectfully submitted that the petition for a writ of certiorari should be granted and the judgment of the court of appeals reversed.

REX E. LEE
Solicitor General

FEBRUARY 1983

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CORRECTED COPY

No. 82-639

FILED

JUN 15 1983

ALEXANDER L. STEVAS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, PETITIONER

v.

HARRISON P. CRONIC

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the court of appeals correctly reversed respondent's convictions on the ground that he did not receive effective assistance of counsel at trial, without identifying any error by counsel—much less a serious dereliction that fell outside the range of competence demanded of attorneys in criminal cases—and without finding any prejudice to respondent.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-660

UNITED STATES OF AMERICA, PETITIONER

v.

HARRISON P. CRONIC

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 675 F.2d 1126.

JURISDICTION

The judgment of the court of appeals (Pet. App. 8a) was entered on April 19, 1982. A petition for rehearing was denied on July 16, 1982 (Pet. App. 9a). On September 9, 1982, Justice White extended the time within which to file a petition for a writ of certiorari to and including October 14, 1982. The petition was filed on that date and granted on February 22, 1983 (J.A. 123). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence.

STATEMENT

1. On February 5, 1980, respondent and co-defendants Wylie Merritt and Carolyn Cummings were indicted in the United States District Court for the Western District of Oklahoma on 13 counts of mail fraud in violation of 18 U.S.C. 1341 and 2.[1] The indictment charged that respondent and the co-defendants had engaged in a check-kiting scheme between banks in Tampa, Florida and Norman, Oklahoma. The checks were drawn on the accounts of Skyproof Manufacturing, Inc., a Florida corporation that was held out as a manufacturer of roof trusses for mobile homes (Pet. App. 1a-2a; J.A. 10-23).

Respondent and Cummings initially were represented by a single attorney, Arnold D. Levine of Tampa, Florida. Prior to trial, however, Levine moved to withdraw as counsel for respondent on the ground that the interests of Cummings and respondent were in conflict. Respondent filed a pro se opposition to the motion to withdraw. After the motion was filed, the court appointed another attorney, Chris Colston, to represent respondent, subject to the possibility of relieving Colston if the court declined to grant Levine's motion to withdraw (J.A. 24-27).

At a hearing on the motion to withdraw, held on June 19, 1980, respondent attempted to establish that Levine actually sought to withdraw because of a dispute over

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[1] The court of appeals' opinion erroneously states that respondent was indicted for mail fraud and unlawful use of a fictitious name in violation of 1341 and 1342 (Pet. App. 1a), apparently substituting 18 U.S.C. 1342 for 18 U.S.C. 2, the aiding and abetting statute. We made the same error in the certiorari petition (Pet. 2).

fees (J.A. 27-31). After the hearing had progressed for a short period, the court concluded that there was indeed a conflict of interest and hostility between respondent on the one hand and Levine and Cummings on the other, and it therefore granted Levine's motion to withdraw (J.A. 31-32).

The trial previously had been scheduled to begin on June 30, 1980, some 11 days after the hearing (J.A. 32-33). At the hearing, however, respondent informed the court of his view that he could not receive a fair defense if Colston were given only "one or two weeks to prepare" for trial (J.A. 33). Levine told the court that Colston would need 30 days to prepare (J.A. 35), and Colston requested that a minimum of 30 days be allowed (J.A. 35). The court granted a continuance, but decided to cut the continuance "a few days short" of the 30 days requested by Colston so that the trial would commence on the first day of the court's July docket (J.A. 35). The record does not disclose that Colston or respondent thereafter raised any further objection to the July 14 trial date, which was 25 days from the date of the hearing.

Colston stated at the hearing on Levine's motion to withdraw that the United States Attorney's Office had granted him access to the files in the postal inspector's office the previous day (J.A. 35), and the Assistant United States Attorney reiterated at the hearing that the responsible postal inspection official was prepared to meet with Colston at the latter's convenience for discovery purposes (J.A. 36). At the close of the hearing, respondent informed the court that he had spoken with Colston and that Colston had "been most helpful" (J.A. 38), but respondent pointed out that Colston's specialty was real estate law and that Colston had previously been involved in only one federal criminal case. The court replied that if respondent intended by this observation to request that he be permitted to select his own lawyer to be appointed by the court, that request was denied. The court explained that Colston was "very bright" and that he had been selected from an alphabetical list of lawyers

in the district who were qualified and screened for this purpose (J.A. 38).

2.a. When the trial commenced as scheduled on July 14, 1980, the court asked Colston whether respondent was "ready," and Colston said "yes" (Tr. 3). Another attorney, Ryland Rivas, was present to assist Colston in his representation of respondent at trial (Tr. 2).

The government introduced evidence establishing the existence of the check-kiting scheme between Skyproof accounts in banks in Tampa and Norman, with the checks cleared by the use of the mails through intermediate banks (J.A. 44-46, 48-52, 58-59, 62-64; Tr. 110-113, 114-130, 134-148, 150-151, 152-160, 167-184, 227-255, 261-283, 323-324). As a result of these transactions, the Norman Bank of Commerce suffered a loss of approximately $484,000 (J.A. 51; Tr. 176, 300, 448). The checks were signed by co-defendant Cummings, who was formally the president of Skyproof, but the evidence showed that respondent directed the affairs of Skyproof (J.A. 49-50, 68, 73; Tr. 169-172, 186, 223-224, 304-307, 318, 320, 340-343). Respondent had not been identified as an officer or owner of the company because of prior difficulties with the Internal Revenue Service and unfavorable publicity about prior business dealings (Tr. 475). Cummings testified that although she was president of Skyproof, respondent directed its affairs, conceived of the check-kiting scheme, and instructed her to sign checks (J.A. 83-84; Tr. 479-488, 491-492, 494-496, 505, 508, 510-512). Co-defendant Wylie Merritt, an accountant residing in Norman who participated in some of the transactions, also testified that respondent was the true head of Skyproof and had directed its affairs (Tr. 365, 368, 370, 373, 382, 389, 392, 394-395).[2]

b. Colston's trial strategy, as the court of appeals observed, consisted in large part of "putting the govern-

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[2] Cummings pleaded guilty to three counts of the indictment prior to trial (J.A. 87), and the government agreed to dismiss the indictment against Merritt if he testified truthfully at trial (J.A. 77-78).

ment to its proofs, pointing an accusatory finger at one of the allegedly defrauded banks, and arguing that the bank's toleration of overdrafts was an informal extension of credit to a legitimate business" (Pet. App. 2a). Colston's questions to employees of the Norman Bank of Commerce suggested that, because the bank's lending capability was based upon the total amount of deposits on its books, the Bank had condoned the deposit of overdrafts that it believed would be made good later (J.A. 66-67; Tr. 443).

In an effort to disassociate respondent from both the check-kiting transactions and the business entity used in perpetrating the fraud, Colston, during cross-examination, elicited testimony that Cummings had executed the checks, that the officials of the banks involved had never heard of respondent, and that Cummings, not respondent, was the president and sole stockholder of Skyproof (J.A. 46-47, 53-56, 61-62, 65, 68, 73-74, 77, 80; Tr. 108, 204-206). Colston also sought to establish that although the indictment alleged that Skyproof was merely a sham, the corporation in fact was a legitimate and growing business concern and thus would have had a lawful reason to conduct a large volume of transactions by check (J.A. 70-71, 79, 87). In addition, although bank employees testified on direct examination that in the normal course of business checks were transmitted by express mail to clearinghouses for collection, those employees admitted on cross-examination by Colston that they had no personal knowledge that the specific overdrafts at issue in this case actually were sent through the mails (J.A. 47-48; Tr. 149-150, 151-152, 160-162). Finally, Colston's questioning of the government's principal witnesses, co-defendants Merritt and Cummings, established that both would derive substantial benefits with respect to the charges pending against them as a result of their testimony against respondent (J.A. 77-78, 79, 90-91). Colston also pursued each of these defense theories during his closing argument (J.A. 97-103).

c. At the close of the government's case, the defense made a motion to dismiss the indictment on the ground

that the government had failed to establish any case against respondent. The district court denied the motion, concluding that the evidence presented a question for the jury (J.A. 94). The court previously had granted respondent's motion to subpoena seven witnesses, and the record indicates that at least some of those witnesses were present at the time of trial (J.A. 97). Colston informed the court, however, that the defense would not call any witness (J.A. 94). During this conference with the judge, the following colloquy occurred regarding Colston's performance (J.A. 94-95):

> THE COURT: * * * This young man, Colston, I think, has done a tremendous job representing you.
> [RESPONDENT]: I agree, certainly agree.
> THE COURT: You acted at one time that you weren't happy, but that was earlier when you hadn't seen him in action.
> [RESPONDENT]: I am certainly glad you overruled me.
> THE COURT: He's a very fine young lawyer and this other young man over there too. * * *

The court then explained to respondent that he had the right to testify or not to testify, that if he did testify he would be subject to cross-examination on the basis of a prior conviction in Tampa for giving a false statement to a bank, and that he was entitled to have the jury instructed that no adverse inference should be drawn from his failure to testify (J.A. 95-97). Respondent stated that he would defer to counsel on whether the instruction should be given (J.A. 95) and agreed that it should be. After discussing the possible use of the prior conviction, the court determined that respondent's decision not to take the stand was made intelligently, with knowledge of all the options (J.A. 96-97). Immediately thereafter, a further exchange occurred regarding the performance of defense counsel (J.A. 97):

> THE COURT: I want to make a record on one thing I forgot, but the second after the Court Reporter left in there, [respondent] expressed his personal appreciation of these lawyers for the good

> work they have done and he wanted to make it a part of the record.
>
> [RESPONDENT]: I would also like to state the reason I went up to Mr. Colston's office yesterday was so that Mr. Emery, his senior law partner, would know that before I either won or lost.

After Colston expressed his satisfaction with the jury instructions, the court similarly stated to Colston and co-counsel Rivas (J.A. 104):

> Well, boys, I want to tell you again I appreciate you two, you know, this guy couldn't have got a better representation if he had hired someone in Florida or Oklahoma City or anyplace else and I appreciate it.

After deliberating for 2¼ hours, the jury returned a verdict of guilty on 11 counts and not guilty on two counts (Tr. 601).[3] On August 28, 1980, respondent was sentenced to a total of 25 years' imprisonment and a fine of $11,000 (Pet. App. 2a; J.A. 5).

3. The court of appeals reversed respondent's convictions on the ground that he was denied the effective assistance of counsel at trial (Pet. App. 2a). The court did so even though the district court had not conducted an evidentiary hearing or made factual findings concerning the effectiveness of counsel.[4] Nor did the court of appeals

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[3] After the court accepted the verdict, it briefly discussed the procedure regarding sentencing, observing that respondent could address the court personally and that his "very able lawyers" could speak for him as well (Tr. 603).

[4] On March 11, 1981, while the appeal was pending and more than six months after the judgment of conviction was entered, respondent filed a pro se motion for a new trial in which he alleged that he had received ineffective assistance of counsel, principally because of counsel's asserted failure to investigate certain matters. The district court denied the motion without reaching the merits because the case was pending on appeal. See Fed. R. Crim. P. 33. The court of appeals granted respondent's motion to file the new trial motion as a supplement to the record on appeal (J.A. 7),

find it significant that, as the government contended, there had been no showing that respondent's counsel had failed to exercise " 'the skill, judgment and diligence of a reasonably competent defense attorney' "—the standard utilized by the Tenth Circuit for evaluating claims of ineffective assistance of counsel (*id.* at 3a, quoting *Dyer* v. *Crisp*, 613 F.2d 275, 278 (en banc), cert. denied, 445 U.S. 945 (1980)). The court explained that under its prior decisions, "when circumstances hamper a given lawyer's preparation of [the case], the defendant need not show specified errors in the conduct of his defense in order to show ineffective assistance of counsel" (Pet. App. 3a). The court of appeals instead "inferred" that counsel's representation was inadequate by relying on five "circumstances" (Pet. App. 4a):

> (1) the time afforded for investigation and preparation; (2) the experience of counsel; (3) the gravity of the charge; (4) the complexity of possible defenses; and (5) the accessibility of witnesses to counsel.

The court of appeals did not independently assess the degree to which these factors actually indicated that defense counsel's performance in this case was seriously deficient; it simply compared the circumstances of this case with those of *United States* v. *King*, 664 F.2d 1171 (10th Cir. 1981), in which it likewise had "inferred" that the defendant had received ineffective assistance of counsel, and concluded that the same result should obtain here.

The court observed, for example, that Colston had 25 days to prepare for trial of a case that the government had developed over a 4½-year period, as compared with the 27 days available for preparation of a defense to the tax fraud charge in *King* that the government developed over a 3-year period. The court also noted that respond-

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but it did not rely on any of the allegations or materials in the motion in holding that respondent had received ineffective assistance of counsel.

ent faced a sentence of up to 65 years' imprisonment and actually was sentenced to 25 years, while in *King* the defendant faced a maximum sentence of only five years. The court of appeals further noted that while it had not discussed in *King* the matter of the accessibility of witnesses to counsel, here—although no defense witnesses testified at trial—the government's witnesses came from four states (Pet. App. 4a-5a). In addition, the court noted that respondent lived in Florida and Georgia and his lawyer lived in Oklahoma (*id.* at 5a).

The court did perceive a material distinction between this case and *King* in that the latter was more complex, involving approximately 200 witnesses and 5000 exhibits, as compared with 17 witnesses and 50 exhibits in this case (Pet. App. 2a, 5a). Nevertheless, the court observed that "[respondent's] case was not an ideal one for an aspiring criminal defense lawyer to cut his teeth on" (*ibid.*) because, in the court's view, " '[m]ail fraud cases tend to be factually and legally complex' " (*ibid.*, quoting *United States* v. *Golub*, 638 F.2d 185, 188 (10th Cir. 1980)). Finally, the court reasoned that if this case indeed was simpler than *King*, that advantage was offset by Colston's lack of experience in criminal trials (Pet. App. 5a).

4. The government filed a petition for rehearing with suggestion for rehearing en banc, noting that the claim of ineffective assistance of counsel had been raised for the first time on appeal and arguing, inter alia, that the claim should not be upheld without an evidentiary hearing. Pet. for Reh. 1-2. The government also pointed out (*id.* at 7-8) that Colston was assisted in his representation of respondent by another attorney, Ryland Rivas. In an affidavit appended to the government's petition for rehearing, Rivas stated that he had been admitted to practice in 1974 and that prior to 1980, the date of respondent's trial, he had had "extensive experience in the practice of criminal law and * * * had tried jury cases ranging from escape from the penitentiary to murder in

the 1st degree" (App. *infra*, 1a). Rivas also stated that he "assisted Mr. Chris Colston in his preparation of defense for [respondent] and was present during all stages in the proceedings to assist Mr. Colston with the preparation and drafting of motions, examination of witnesses and examination of all evidence available to Mr. Colston" (*ibid.*).

The government's petition for rehearing and suggestion of rehearing en banc were denied (Pet. App. 9a).

SUMMARY OF ARGUMENT

The court of appeals erred in reversing respondent's convictions on the ground that he received ineffective assistance of counsel, without finding that counsel committed any errors whatever or that respondent was prejudiced in any way by his attorney's representation.

A. A final judgment of conviction entered after a criminal trial at which the resources of society were concentrated to decide the guilt or innocence of the accused should not lightly be set aside on the basis of a subsequent trial of his lawyer's performance. The focus of the inquiry, rather, must be on whether the accused received a fair trial in light of the assistance rendered by counsel. Accordingly, where, as here, counsel was unfettered by improper external restraints, a court may not set aside a conviction on the basis of assertedly ineffective assistance of counsel unless it finds that counsel committed serious errors that substantially prejudiced the accused or fundamentally undermined the fairness of the proceedings. There are other measures available to legislatures, courts, law schools, and the organized bar to improve the quality of performance by defense counsel. That is not, however, the principal concern of a court considering the validity of a final judgment of conviction. Unless asserted defects in counsel's performance actually had an "impact on the criminal proceeding, * * * there is no basis for imposing a remedy in that proceeding." *United States* v. *Morrison*, 449 U.S. 361, 365 (1981).

There are, moreover, a number of mechanisms other than the Sixth Amendment for correcting serious errors that were overlooked in a criminal trial. Under Fed. R. Crim. P. 52(b), plain errors may be noticed on appeal even if counsel overlooked them at trial, and a new trial may be granted under Fed. R. Crim. P. 33 on the basis of newly discovered evidence. The Court also has made clear that victims of a fundamental miscarriage of justice ordinarily will be able to satisfy the "cause and prejudice" standard for overcoming a procedural default. In order to avoid circumvention of the standards governing the correction of error by these other mechanisms, a convicted defendant seeking relief on the ground of ineffective assistance of counsel must identify errors by his attorney that were at least as grave as the substantive errors that would warrant setting aside a conviction under those standards.

This conclusion is supported by a proper respect for the integrity of trial courts charged with the obligation to assure the availability of adequate assistance of counsel for defendants. In addition, the lawyer for the accused is an officer of the court who is ethically bound competently and zealously to advance the interests of his client, and a reviewing court must "start with a presumption that he was conscious of his duties to his clients and that he sought conscientiously to discharge those duties." *Matthews* v. *United States*, 518 F.2d 1245, 1246 (7th Cir. 1975) (Stevens, J.).

B. The evolution of the right to "effective" assistance of counsel confirms that a defendant must demonstrate serious error and substantial prejudice or unfairness. The concept of "effective" assistance finds it origins in *Powell* v. *Alabama*, 287 U.S. 45 (1932), in which the Court held that the duty to assign counsel was not discharged by appointment of an attorney so late in the case as to preclude the giving of effective aid in preparation and at trial. The Court since has held that other exter-

nal restraints on the ability of counsel to perform in his traditional role are invalid under the Sixth Amendment because they prevent the attorney from rendering "effective" assistance. See, *e.g.*, *Glasser* v. *United States*, 315 U.S. 60 (1942) (conflict of interest); *Geders* v. *United States*, 425 U.S. 80 (1976) (prohibition against consultation with defendant during overnight recess). The Court has treated these cases as involving the functional equivalent of a total denial of the right to counsel, and it accordingly has reversed the convictions without requiring any specific showing of what the attorney would have done if he had been free of the external restraint or the degree to which the accused was prejudiced as a result, just as it did in the case of a total denial of counsel in *Gideon* v. *Wainwright*, 372 U.S. 335 (1963). Where the alleged "ineffectiveness" of counsel stems not from external restraints, but from the inadequacy of counsel's own performance, the errors likewise must be equivalent in their gravity to a denial of the "Assistance of Counsel" to which the Sixth Amendment explicitly refers.

The Court's decision in *McMann* v. *Richardson*, 397 U.S. 759 (1970), supports this conclusion. There the Court indirectly addressed the question of the competence of counsel in holding that a guilty plea could not be set aside as unintelligently made unless the defendant received advice that was not merely mistaken but outside the range of competence demanded of attorneys in criminal cases. By identifying the ultimate issue to be whether the plea was intelligently made, *McMann* indicates that the primary focus must be on the rights of the accused, not the actions of his attorney. Advice so deficient that it renders a guilty plea unintelligent clearly can be said to have substantially prejudiced the accused and led to a fundamentally unfair result; *McMann* thereby supports the view that this should be the perspective of the courts in ineffectiveness cases generally.

At a minimum, *McMann* and the general thrust of the subsequent decisions of the courts of appeals require that the convicted defendant identify specific and serious derelictions by counsel that fell below the minimum level of performance of reasonably competent counsel and materially prejudiced the accused. The court of appeals erred in reversing respondent's convictions without making such a finding here.

C. The circumstances relied upon by the court of appeals were wholly insufficient to support what it termed an "inference" that respondent received ineffective assistance of counsel. Clearly it cannot be said that the 25 days counsel was allowed prior to trial precluded him from consulting with respondent and preparing the defense, so that a conclusive presumption of ineffective assistance of counsel could be justified under the rationale of *Powell* v. *Alabama*. This Court's decisions in *Avery* v. *Alabama*, 308 U.S. 444 (1940), and *Chambers* v. *Maroney*, 399 U.S. 42, 53-54 (1970), foreclose such a conclusion. Furthermore, the district court in fact *granted* respondent's request for a continuance to allow him time to prepare for trial, although it cut the continuance a few days short to accommodate the trial date to the court's schedule. It was entirely reasonable for the court to take this course, especially since counsel proclaimed at the outset of trial that he was ready to proceed.

Nor did attorney Colston's lack of prior experience in criminal trials warrant reversal of the conviction without a showing that this inexperience in turn led to specific errors in conducting the defense. Indeed, the district court and respondent expressed enthusiastic approval of Colston's performance. The court of appeals also overlooked the fact that Colston was assisted by another attorney who apparently had extensive prior experience in criminal trials.

In addition, whatever the validity of the court of appeals' view that mail fraud cases generally "tend" to be

complex, the court pointed to nothing to suggest that *this* case was too complex for Colston and his colleague to grasp in the time allowed. The fact that respondent faced up to 65 years' imprisonment merely reflected that he was indicted on 13 separate counts of mail fraud arising out of the same course of conduct, each of which carried a maximum five-year term of imprisonment. And, finally, there is no indication that the location of the government's witnesses in several different states and respondent's residence in Florida and Georgia had any effect on counsel's preparation of the case.

D. The court of appeals erred in believing that because circumstances "hampered" counsel's preparation, respondent should be excused from showing that counsel's performance was not within the range of competence demanded of defense counsel. The factual premise for the court's ruling is unsupported, because there was no finding that counsel in fact were in any way "hampered" in their preparation. But even if there were time or other constraints on their performance, the same probably could be said of the performance by defense counsel in most criminal trials. If the asserted lack of preparation or understanding of certain aspects of the case actually affected the trial, respondent should be capable of identifying the acts or omissions that resulted. The court of appeals failed to find any such errors, however, and its judgment therefore must be reversed.

ARGUMENT

THE COURT OF APPEALS ERRED IN VACATING RESPONDENT'S CONVICTIONS ON THE GROUND OF INEFFECTIVE ASSISTANCE OF COUNSEL, BECAUSE THE COURT DID NOT FIND THAT COUNSEL'S ACTUAL PERFORMANCE WAS DEFICIENT IN ANY RESPECT

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence." The explicit requirement of the Amendment of course was satisfied in this case, because respondent was represented by counsel in his prosecution for mail fraud. Indeed, he was assisted by two lawyers, one of whom—according to an uncontradicted affidavit filed by the government in the court of appeals (App., *infra*, 1a)—had extensive experience in criminal trials.

The court of appeals nevertheless held that respondent was denied his Sixth Amendment right because, in the court's view, the assistance of counsel respondent concededly received must be deemed to have been "inadequate" or "ineffective" (Pet. App. 4a-5a). Yet in vacating respondent's convictions on this ground, the court did not point to *any* error committed by counsel, much less conclude that any such error was of a kind or magnitude that it caused counsel's performance to fall below some minimally acceptable level of competence for a lawyer in a criminal case or deprived respondent of a fair trial. Nor did the court find that any error by counsel—assuming there was error—had a probable effect on the outcome of the prosecution or substantially prejudiced the defense.

Where, as here, the timing or other circumstances of an attorney's appointment were not such as to require a conclusive presumption by the reviewing court that an attorney would be unable to prepare and conduct an adequate defense (compare *Powell* v. *Alabama*, 287 U.S. 45,

71 (1932)), the court may set aside a conviction on the ground of inadequate assistance of counsel only if it finds specific "gross errors" or "serious derelictions" by counsel in his actual handling of the case that caused his representation to fall below the range of competence demanded of attorneys in criminal cases (*McMann* v. *Richardson*, 397 U.S. 759, 772, 774 (1970)) and further finds that the defendant suffered substantial prejudice as a result (see, *e.g.*, *Chambers* v. *Maroney*, 399 U.S. 42, 53-54 (1970)). Because respondent has not established, and the courts below did not find, that counsel committed any such errors or that respondent was prejudiced by counsel's performance (the court of appeals reversed respondent's convictions without even providing for an evidentiary hearing on these matters), the judgment of the court of appeals should be reversed and respondent's convictions reinstated.[5]

A. No Claim Of Ineffective Assistance Of Counsel Should Be Entertained Unless Serious Derelictions By Counsel Are Shown That Substantially Prejudiced The Defense

A number of considerations pertaining to the nature and purposes of an inquiry into counsel's performance at trial strongly suggest that where counsel was unfettered by external restraints on his ability to fulfill a lawyer's traditional role, a court may set aside a conviction on the basis of assertedly ineffective assistance of counsel only upon a showing of serious errors that substantially prejudiced the accused or fundamentally undermined the fairness of the proceedings.

1. As relevant here, the Sixth Amendment provides only that "the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence." It does not

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[5] This disposition would not forclose respondent from raising more specific allegations of constitutionally inadequate assistance of counsel in a collateral attack on his convictions under 28 U.S.C. 2255, if a concrete basis exists for such a claim.

state that whatever assistance of counsel the accused receives must be "effective." That word instead has been used by the courts to describe certain features of the right to counsel as that right has evolved judicially over the years.

The word "effective" has a number of different meanings in ordinary usage, and it has been employed to describe somewhat different concepts in Sixth Amendment doctrine. Indeed, the nature of an inquiry into a lawyer's performance may vary considerably depending upon the meaning given to the term. For example, if the word "effective" were understood to mean "productive of results," [6] then an attorney's performance might be deemed "ineffective" whenever he failed to secure an acquittal for his client. But of course it never has been suggested that the Sixth Amendment guarantees that the defense put forward by counsel will succeed.

Similarly, if the word were given certain other of its accepted meanings—*e.g.*, "impressive," "cogent," "pleasing," or "satisfying" [7]—the concept of "effective" counsel would suggest an attorney who is especially articulate and forceful, has a commanding presence in court, and possesses a personal demeanor that inspires the confidence of his client and others. But although these characteristics surely are conducive to success in the legal profession, the Sixth Amendment just as surely was not intended to constitutionalize such vague and elusive elements of a lawyer's human nature and professional style, any more than it was intended to guarantee the development of a "meaningful relationship" between attorney and client. See *Morris* v. *Slappy*, No. 81-1095 (Apr. 20, 1983), slip op. 11-12. Nor would it be practicable for a court reliably to evaluate a lawyer's performance against such amorphous standards. Cf. *id.* at 12.

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[6] See *Webster's Third New International Dictionary* 724 (4th ed. 1976), definition 1a.

[7] See *Webster's Third New International Dictionary* 724 (4th ed. 1976), definitions 2c and d.

Moreover, a view of "effective" assistance of counsel for Sixth Amendment purposes that focused principally on the attributes of counsel would improperly transform the Sixth Amendment inquiry from an assessment of whether the accused received a fair trial in light of the assistance counsel rendered to a more detached assessment of the skills and performance of the lawyer in their own right—as if the purpose of the inquiry were to grade the lawyer's participation in an advocacy seminar or to identify areas in which the lawyer might benefit from personal or professional improvement. Such an approach would not comport with the respect due the criminal trial itself as the "decisive and portentous event" (*Wainwright* v. *Sykes*, 433 U.S. 72, 90 (1977)).

The trial of a criminal case concentrates society's resources at one "time and place in order to decide, within the limits of human fallibility, the question of guilt or innocence." *Ibid.* "Every trial presents a myriad of possible claims," and—whether as a result of trial strategy, ignorance, the pressures of trial, or other factors—it is virtually inevitable that counsel in the normal course will overlook or choose to omit certain claims while pursuing others. *Engle* v. *Isaac*, 456 U.S. 107, 128-129 & n.34, 133-134 (1982). The Constitution therefore does not, and realistically could not, require that defense counsel recognize and raise every potentially meritorious claim on behalf of the accused. *Id.* at 134; *Wainwright* v. *Sykes*, *supra*, 433 U.S. at 91; *Estelle* v. *Williams*, 425 U.S. 501, 512-513 (1976); *id.* at 514-515 (Powell, J., concurring); cf. *Jones* v. *Barnes*, No. 81-1794 (July 5, 1983); *United States* v. *Agurs*, 427 U.S. 97, 102 n.5 (1976). As the Court recently observed, "taking into account the reality of the human fallibility of the participants, there can be no such thing as an error-free, perfect trial." *United States* v. *Hasting*, No. 81-1463 (May 23, 1983), slip op. 9. Due regard for the finality of a judgment of conviction in our imperfect adversary system of criminal justice therefore "presupposes * * * that

the trial of a criminal defendant will not inevitably be followed by a trial of his attorney's performance." *Wainwright* v. *Sykes*, *supra*, 433 U.S. at 114 n.13 (Brennan, J., dissenting). Such a practice would "detract[] from the [criminal] trial's significance" (*Engle* v. *Isaac*, *supra*, 456 U.S. at 128-129).[8] An examination into the performance of counsel therefore is appropriate only upon allegations of specific, serious errors in counsel's performance that assertedly detracted from the trial's fairness.

2. There is, of course, a substantial public interest in assuring that the attorneys who represent defendants in criminal prosecutions are capable of providing adequate assistance. Courts, legislatures, the organized bar, and

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[8] Unduly intrusive scrutiny of defense strategy in the course of considering a post-conviction claim of ineffective assistance of counsel also could dampen the ardor of defense counsel and require a potentially unseemly probing of the relationship and communications between attorney and client, thereby undermining the sense of mutual trust in criminal cases generally. *Cf. Polk County* v. *Dodson*, 454 F.2d 312, 324 & n.17 (1981); *United States* v. *Decoster*, 624 F.2d 196, 208-209 (D.C. Cir.) (en banc) (plurality opinion), cert. denied, 444 U.S. 944 (1979); *id.* at 228-229 (MacKinnon, J., concurring). "The effect on the [defense bar] would be demoralizing. And the interests of the clients and the cause of justice would be poorly served." *Upjohn Co.* v. *United States*, 449 U.S. 383, 398 (1981), quoting *Hickman* v. *Taylor*, 329 U.S. 495, 510-511 (1947); see also *FTC* v. *Grolier, Inc.*, No. 82-372 (June 6, 1983), slip op. 4-5. Such inquiries also could undermine the constitutionally required independence of defense counsel (see *Polk County*, *supra*, 454 U.S. at 318-319, 321-322; *Estelle* v. *Williams*, *supra*, 425 U.S. at 512) by inducing courts and prosecutors to oversee and second-guess judgments by defense counsel in order to protect the conviction from later attack on the basis of ineffective assistance of counsel. *Decoster*, *supra*, 624 F.2d at 208 (plurality opinion); *id.* at 228-229 (MacKinnon, J., concurring); Bines, *Remedying Ineffective Representation in Criminal Cases: Departures From Habeas Corpus*, 59 Va. L. Rev. 927, 961 (1973). See also Schwarzer, *Dealing With Incompetent Counsel—The Trial Judge's Role*, 93 Harv. L. Rev. 633, 650 (1980); but see *id.* at 651-665; Note, *A Fuctional Analysis of the Effective Assistance of Counsel*, 80 Colum. L. Rev. 1053, 1069 (1980).

law schools have a variety of measures at their disposal to address this issue—such as requiring special preparation or certification for members of the criminal defense bar, mandatory participation in programs of continuing legal education, formulation of professional standards to guide defense counsel, and institution of disciplinary proceedings in situations in which an attorney has acted unprofessionally or incompetently.[9]

The concern of a court considering the validity of a final judgment of conviction in a criminal prosecution, however, is far narrower. Its function is not to improve the level of performance of the defense bar generally or even of the individual lawyer who appeared at trial in the particular proceeding, but to determine whether the substantial rights of the accused were violated. If asserted defects in defense counsel's performance did not have an "impact on the criminal proceeding, * * * there is no basis for imposing a remedy in that proceeding." *United States* v. *Morrison*, 449 U.S. 361, 365 (1981). Cf. *United States* v. *Hasting*, *supra*, [redacted] slip op. 6-8 & n.5.

3. It also must be stressed that there are a number of available mechanisms other than the Sixth Amendment to remedy alleged defects in a criminal trial. Under Fed. R. Crim. P. 52(b), a court of appeals may correct "[p]lain errors or defects affecting substantial rights" even though they were not raised in the district court.

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[9] See Burger, *The Special Skills Of Advocacy: Are Specialized Training And Certification of Advocates Essential To Our System Of Justice?* 42 Fordham L. Rev. 227 (1973).

In Oklahoma, where respondent was tried, the State Supreme Court has not hesitated to discipline attorneys for neglect of their duties to their clients. See, *e.g.*, *State ex rel. Oklahoma Bar Ass'n* v. *Bell*, 637 P.2d 1258 (1981); *State ex rel. Oklahoma Bar Ass'n* v. *Peveto*, 620 P.2d 392 (1980); *Oklahoma Bar Ass'n* v. *Denney*, 617 P.2d 1351 (1980); see also *State ex rel. Oklahoma Bar Ass'n* v. *Raskin*, 642 P.2d 262 (1982). In addition, Rule 4(j), W.D. Okla. (effective Aug. 1, 1982) establishes a procedure for disciplining attorneys.

This rule "was intended to afford a means for the prompt redress of miscarriages of justice." *United States* v. *Frady*, 456 U.S. 152, 163 (1982) (footnote omitted). It permits a court of appeals to reverse a conviction when a trial was "infected with error so 'plain' the trial judge and prosecutor were derelict in countenancing it, even absent the defendant's timely assistance in detecting it." *Ibid.* Many truly serious errors committed by counsel at trial that could result in a miscarriage of justice may be corrected on appeal under this rule.

Moreover, if evidence was not introduced at trial, a defendant may move for a new trial under Fed. R. Crim. P. 33 on the basis of newly discovered evidence.[10] And a person convicted of a federal or state crime may present on collateral attack a claim that was not raised at trial or on appeal if he establishes "cause" for that default and substantial "prejudice" resulting from the error. *Engle* v. *Isaac*, *supra*; *United States* v. *Frady*, *supra*. The Court in *Engle* v. *Isaac* stressed its confidence that "victims of a fundamental miscarriage of justice will meet the cause-and-prejudice standard" and that "fundamentally unjust incarceration" will be remedied as a result. 456 U.S. at 134. See also *Wainwright* v. *Sykes*, *supra*, 433 U.S. at 90-91.

In view of these established mechanisms for correcting serious errors in criminal proceedings, it presumably

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[10] Under established case law, in order to obtain a new trial on the basis of newly discovered evidence, the defendant must show, inter alia, that the evidence, if available at trial, probably would have resulted in an acquittal (see *United States* v. *Agurs*, *supra*, 427 U.S. at 111 & n.19) and that the evidence could not have been discovered in the exercise of due diligence. See generally 8 J. Moore, W. Taggart & J. Wicker, *Moore's Federal Practice* ¶ 33.03[1] (2d ed. 1982). Although ordinarily a defendant must be bound by his attorney's actions, if the attorney's failure to discover certain evidence was a gross dereliction under all the circumstances, the defendant might well be excused from the conseqeunces of his attorney's lack of due diligence, although he still would have to satisfy the other requirements under the Rule.

would not be necessary in many cases for a court to entertain an independent claim of ineffective assistance of counsel in order to remedy substantial unfairness in the proceedings. But if these established mechanisms are not available in a particular case (perhaps because of a procedural default), the defendant must, in order to obtain relief under the Sixth Amendment on the ground that counsel's performance was inadequate, demonstrate errors by counsel that are at least equally as grave as the substantive errors that would warrant setting aside a conviction under the "plain error" rule on direct appeal, granting a motion for a new trial because newly discovered evidence probably would have resulted in an acquittal, or finding "cause" and "prejudice" sufficient to excuse a procedural default.[11] Otherwise a convicted defendant whose substantive claim would be barred because of a procedural default would be permitted—indeed encouraged—to raise that claim indirectly by recasting it as an attack on his lawyer's performance. See, *e.g.*, *Cooper* v. *Fitzharris*, 586 F.2d 1325, 1333 (9th Cir. 1978) (en banc).[12]

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[11] Because the errors complained of in this category of cases result from the actions of independent counsel, not from governmental actions of the court or prosecutor, there can be no claim that a lesser showing would be appropriate because of a need to deter unlawful governmental conduct or even because of governmental participation in or responsibility for the conduct involved. Compare *United States* v. *Agurs*, *supra*, 427 U.S. at 111; *United States* v. *Valenzuela-Bernal*, No. 81-450 (July 2, 1982), slip op. 7, 10, 14-15; *id.* at 2, 5 (O'Connor, J., concurring in the judgment). See *United States* v. *Green*, 680 F.2d 183, 188-189 (D.C. Cir. 1982), cert. denied, No. 82-5552 (Feb. 22, 1983); *Decoster*, *supra*, 624 F.2d at 214 (plurality opinion); *Washington* v. *Strickland*, 693 F.2d 1243, 1260 (5th Cir. 1982), cert. granted, No. 82-1554 (June 6, 1983).

[12] This conclusion is consistent with the relationship between attorney and client in a criminal case. The Sixth Amendment "speaks of the 'assistance' of counsel, and an assistant, however expert, is still an assistant." *Faretta* v. *California*, 422 U.S. 806, 820 (1975). When a defendant chooses to have a lawyer manage and present his case, law and tradition may allocate to the counsel

4. The soundness of this conclusion is reinforced by a proper respect for the integrity of the criminal justice system and the performance of defense counsel who participate in that system. By admitting an attorney to the practice of law before it, a court has determined that the attorney possesses the necessary qualifications and competence to perform his duties. And in providing for the appointment of counsel to represent the accused—in this case, pursuant to a plan adopted under the Criminal Justice Act of 1964, 18 U.S.C. (& Supp. V) 3006A—the court must be presumed to have conscientiously performed its obligation to assure the availability of adequate assistance of counsel for the defense. See *Polk County* v. *Dodson*, 454 U.S. 312, 322 (1981); cf. *Schweiker* v. *McClure*, 456 U.S. 188, 197 n.11, 200 (1982); *Mathews* v. *Eldridge*, 424 U.S. 319, 349 (1976).

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the power to make binding decisions on all but such fundamental matters as whether to plead guilty, waive a jury, testify, or take an appeal. *Id.* at 860. See *Jones* v. *Barnes*, No. 81-1794 (July 5, 1983), slip op. 8. The lawyer makes those decisions, however, not in his own right, but as the representative of the accused; the defense the lawyer presents accordingly is, in contemplation of law, that of the accused personally. *Faretta*, *supra*, 422 U.S. at 820-821. The defendant therefore must be bound by his attorney's conduct of the trial "except where 'the circumstances are exceptional' " (*Wainwright* v. *Sykes*, *supra*, 433 U.S. at 91 n.14, quoting *Henry* v. *Mississippi*, 379 U.S. 443, 451 (1965); see also *Jones* v. *Barnes*, *supra*, slip op. 5 (Brennan, J., dissenting)). In the present setting, the defendant must be bound unless the attorney's actions so depart from the range of competence and standards of fairness that define the scope of the agency relationship established by law between attorney and client in criminal cases that they cannot justly be deemed the actions of the defendant. Compare *McMann* v. *Richardson*, *supra* (guilty plea may be set aside where attorney's advice caused client's guilty plea not to be intelligent), with *Estelle* v. *Williams*, *supra*, 425 U.S. at 512-513 & n.9; *id.* at 514-515 & n.4 (Powell, J., concurring) (defendant bound by attorney's failure to object to his being tried in prison clothes, whether that failure resulted from a tactical choice, indifference, or procedural default). See also *Engle* v. *Isaac*, *supra*, 456 U.S. at 134.

In addition, the lawyer for the accused in a criminal prosecution is an officer of the court and is bound by ethical obligations of the profession to assume responsibility only for cases that he is competent to handle, to prepare adequately, and to represent his client zealously and without neglect of the interests of his client. See Model Code of Professional Responsibility DR 6-101(A), 7-101(A) (1978);[13] *Polk County*, *supra*, 454 U.S. at 318, 321, 323. Just as it must be presumed that a judge will fulfill his obligation to be an impartial decisionmaker (cf. *Youngberg* v. *Romeo*, 457 U.S. 307, 323 (1982); *Schweiker* v. *McClure*, *supra*, 456 U.S. at 195; *United States* v. *Morgan*, 313 U.S. 409, 421 (1941)), a court that is asked to consider a claim that counsel has failed to discharge his professional responsibilities must "start with a presumption that he was conscious of his duties to his clients and that he sought conscientiously to discharge those duties." *Matthews* v. *United States*, 518 F.2d 1245, 1246 (7th Cir. 1975) (Stevens, J.). See *Michel* v. *Louisiana*, 350 U.S. 91, 101 (1955); *Cuyler* v. *Sullivan*, 446 U.S. 335, 346-347 (1980); *Washington* v. *Strickland*, 693 F.2d 1243 (5th Cir. 1982) (en banc), cert. granted, No. 82-1554 (June 6, 1983); *Tinlin* v. *Parratt*, 680 F.2d 48, 50 (8th Cir. 1982). A strong showing must be made to overcome these presumptions.

5. For all of the foregoing reasons, we submit that reversal of a criminal conviction because of asserted inadequacies in counsel's representation is appropriate only if specifically identifiable errors caused counsel's performance to depart substantially from what reasonably may be expected of an ordinary fallible lawyer, and if those

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[13] These Disciplinary Rules have been adopted by the Oklahoma Supreme Court to govern the conduct of the members of the Bar of that State (Okla. Stat. Ann. tit. 5, ch. 1 App. 3 (West Cum. Supp. 1982), and they have been adopted and are enforceable as standards of conduct for attorneys in the federal district court in which respondent was convicted. See note 9, *supra*.

errors were equivalent in their gravity to a denial of the "Assistance of Counsel" to which the Sixth Amendment explicitly refers. This requires a showing that counsel's errors resulted in substantial prejudice to the accused or otherwise fundamentally undermined the fairness of the proceedings against him. The Court's decision in *McMann* v. *Richardson*, *supra*, supports this formulation. See pages 31-32, 34, *infra*. Moreover, as we explain below, the structure and purposes of the Sixth Amendment and the origins and development of the judicially fashioned concept of effective assistance of counsel confirm that this is the appropriate nature of the inquiry into the adequacy of the assistance rendered by counsel.

B. The Origins And Evolution Of The Right To "Effective" Assistance Of Counsel Confirm The Soundness Of Requiring A Showing Of Serious Error And Substantial Prejudice Or Unfairness

1. *The Explicit Textual Guarantee*

The Sixth Amendment guarantees a variety of rights to the accused in a criminal prosecution: to have a "speedy and public trial" and an "impartial jury"; "to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; [and] to have compulsory process for obtaining witnesses in his favor * * *." These rights are personal to the accused and "guarantee that a criminal charge may be answered in a manner now considered fundamental to the fair administration of American justice"; they "constitutionalize[] the right in an adversary criminal trial to make a defense as we know it." *Faretta* v. *California*, 422 U.S. 806, 818 (1975). The Sixth Amendment right of the accused to "have the Assistance of Counsel for his defence" supplements this design. It permits the accused to receive advice concerning the nature of the charges against him and the law and facts relevant to his case, and it enables counsel, as the personal representative of the accused, to present the accused's defense to the

charges and to meet the case presented by the professional prosecutor. *Id.* at 820-821.

As this Court has observed, "[t]here is considerable doubt that the Sixth Amendment itself, as originally drafted by the Framers of the Bill of Rights, contemplated any guarantee other than the right of an accused in a criminal prosecution * * * to employ a lawyer to assist in his defense." *Scott* v. *Illinois*, 440 U.S. 367, 370 (1979). Cf. *Powell* v. *Alabama*, *supra*, 287 U.S. at 68. This narrow concept obviously did not require any particular level of competence of whatever lawyer the accused chose to hire. That was essentially a private matter between attorney and client.

Over time, of course, the availability of the assistance of counsel came to be viewed as an essential attribute of a fair trial, because the accused ordinarily lacks the professional training and skill necessary to present a defense.[14] Accordingly, this Court has held that if an accused facing imprisonment upon conviction is financially unable to retain counsel, the government must assure that an attorney is appointed to assist him, unless he knowingly and intelligently waives his right to counsel. If counsel has not been furnished in these circumstances, the conviction will be reversed without requiring the convicted defendant to make a specific showing of what an attorney would have done in the case or the prejudice that resulted from counsel's absence.[15] The government's role in providing counsel is limited, however. Once appointed counsel has undertaken to represent the accused, he assumes the role of a "personal counselor and advo-

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[14] See, *e.g.*, *Johnson* v. *Zerbst*, 304 U.S. 458, 462-463 (1938), quoting *Powell* v. *Alabama*, *supra*, 287 U.S. at 68-69; *Gideon* v. *Wainwright*, 372 U.S. 335, 343-345 (1963); *Argersinger* v. *Hamlin*, 407 U.S. 25, 31 (1972); *Faretta* v. *California*, *supra*, 422 U.S. at 832-833; *United States* v. *Morrison*, *supra*, 449 U.S. at 365.

[15] *Johnson* v. *Zerbst*, *supra*; *Gideon* v. *Wainwright*, *supra*; see also *Faretta* v. *California*, *supra*, 422 U.S. at 832-835; *Argersinger* v. *Hamlin*, *supra*; *Scott* v. *Illinois*, *supra*.

cate." *Polk County, supra*, 454 U.S. at 318. This is "essentially a private function, traditionally filled by retained counsel" (*id.* at 319). See also *id.* at 327 (Burger, C.J., concurring).

2. *Use Of The Term "Effective" To Connote An Implicit Requirement That Counsel Be Free From External Restraints*

This Court has made clear, of course, that the mandate of the Sixth Amendment that the accused have the assistance of counsel is not automatically satisfied by the mere formal appointment of counsel. See *Cuyler* v. *Sullivan, supra*, 446 U.S. at 334. In *Powell* v. *Alabama, supra*, the Court held that the duty to assign counsel "is not discharged by an assignment at such time or under such circumstances as to *preclude* the giving of effective aid in the preparation and trial of the case." 287 U.S. at 71 (emphasis added). The Court there held that the defendants were not accorded the right to counsel in any "substantial" or "real" sense because the trial court initially had appointed all of the members of the local bar—and therefore effectively no lawyer at all—to assist the defendants in advance of trial, and no individual lawyer had assumed responsibility for the case until a few moments prior to trial, when there remained no opportunity for consultation or investigation. *Id.* at 57-58, 71. Although counsel thus was formally designated for the defendants, the Court held that this was not the "effective appointment of counsel" required by the Constitution (*id.* at 57, 58), and it accordingly reversed the convictions without an inquiry into the specific actions counsel might have taken if given an opportunity to consult and prepare or whether the defendants were prejudiced by the constructive denial of the assistance of counsel.

The use of the term "effective" in connection with the right to counsel finds its roots in these passages in *Powell*.[16]

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[16] See S. Krantz, *Right to Counsel in Criminal Cases* 166 (1976); *Decoster, supra*, 624 F.2d at 201 n.13 (plurality opinion).

It is evident, however, that the Court used the word "effective" to mean "actual" or "capable of having its normal effect" [17]—*i.e.*, to stress that the trial court must make an appointment of counsel under circumstances that permit counsel to render actual assistance that is capable of having its normal effect in aiding the accused, as distinguished from the sham or merely formal appointment in *Powell* itself, which did not provide any realistic opportunity for the defendants to benefit from an attorney's presence. The focus of the Court's concern thus was on removing an externally imposed restraint, virtually total in its effect, on counsel's ability to perform in his traditional role. The Court did not use the word "effective" to suggest a judicially fashioned standard of performance for an attorney who was free of such state-imposed restraints. Similarly, in *Avery* v. *Alabama*, 308 U.S. 444 (1940), the Court, citing *Powell*, observed that "the denial of *opportunity* for appointed counsel to confer, to consult with the accused and to prepare his defense could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel" (*id.* at 446) (emphasis added).[18]

The Court also has found a Sixth Amendment violation resulting from other governmentally imposed restrictions on the ability of counsel to function in his traditional role or to make reasonable tactical judgments at trial. See *Geders* v. *United States*, 425 U.S. 80 (1976) (prohibition against consultation with defendant during overnight recess); *Herring* v. *New York*, 422 U.S. 853 (1975) (denial of right of summation in nonjury trial); *Brooks*

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[17] See *Webster's Third New International Dictionary* 724 (4th ed. 1976), definitions 1b and 4.

[18] See also *Reece* v. *Georgia*, 350 U.S. 85, 90 (1955); *House* v. *Mayo*, 324 U.S. 42, 46 (1945); *White* v. *Ragen*, 324 U.S. 760, 764 (1945); *Ex parte Hawk*, 321 U.S. 114, 115-116 (1944); cf. *Chandler* v. *Fretag*, 348 U.S. 3, 9-10 (1954). Compare *Morris* v. *Slappy*, *supra*, slip op. 9-10; *Chambers* v. *Maroney*, *supra*, 399 U.S. at 53.

v. *Tennessee*, 406 U.S. 605, 612-613 (1972) (requirement that defendant be first defense witness); *Ferguson* v. *Georgia*, 365 U.S. 570, 593-596 (1961) (prohibition against direct examination of defendant). Because the defendants in these cases were in effect entirely deprived of the assistance of counsel at a critical point in the prosecution, the Court, as in *Powell*, set aside the conviction without requiring any specific showing of how the accused was injured as a result.

A final category of cases in which the Court has found a denial of the right to "effective" assistance of counsel consists of those in which counsel had a conflict of interest that impaired his duty of undivided loyalty to the accused. In *Glasser* v. *United States*, 315 U.S. 60 (1942), the Court held that the defendant was denied his Sixth Amendment "right to have the effective assistance of counsel" (*id.* at 76) when the trial court required his attorney simultaneously to represent a co-defendant having conflicting interests, an arrangement that adversely affected the attorney's representation of the defendant (see *id.* at 72-75). The Court explained that just as the failure of the trial court in *Powell* to make "effective appointment of counsel" for the defendants so offended concepts of a fair hearing as to constitute a denial of due process, the assistance of counsel required by the Sixth Amendment "contemplates that such assistance be untrammeled and unimpaired by a court order requiring that [a] lawyer shall simultaneously represent conflicting interests." 315 U.S. at 70. Thus, in *Glasser*, as in *Powell*, the concept of "effective" assistance meant only freedom from externally imposed restraints on counsel's ability to perform in his traditional role. By equating the defect in *Glasser* with the failure in *Powell* to make an "effective appointment of counsel" (see 315 U.S. at 70), the Court viewed representation by a lawyer who has a conflict of interest as essentially the equivalent of no "Assistance of Counsel" at all within the contemplation of the Sixth Amendment. See also *Von Moltke* v. *Gillies*, 332 U.S. 708,

725-726 (1948) (opinion of Black, J.). In view of this fundamental defect, the *Glasser* Court set aside the conviction without inquiry into the degree to which the defendant had been prejudiced as a result, just as it had in *Powell*. See 315 U.S. at 75-76. Accord *Holloway* v. *Arkansas*, 435 U.S. 475, 481-483, 489 (1978); *Cuyler* v. *Sullivan*, *supra*, at 348-350.[19]

Powell, *Geders*, *Glasser*, and the related cases discussed above establish that the "Assistance of Counsel" guaranteed by the Sixth Amendment is assistance unfettered by external restraints that might materially impair the ability of counsel to carry out his traditional role in the adversary system. The Court has treated these cases as the functional equivalent of a total denial of the right to counsel, and it accordingly has reversed convictions where there have been improper external restraints on counsel's performance without requiring any specific showing of resulting prejudice, just as it did in the case of the complete denial of counsel in *Gideon*.[20] Such cases are, however, materially different from those in which it is alleged simply that counsel blundered.

3. *Use Of The Term "Effective" To Refer To The Nature Of Counsel's Performance Without Regard To External Restraints*

In recent years, the term "effective" has been employed by the lower courts to refer not simply to assistance of

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[19] In *Cuyler* v. *Sullivan*, the Court rejected the contention that there was no state action involved in the asserted conflict of interest because the defendants had chosen to be represented by the same retained counsel, concluding that "the failure of retained counsel to provide adequate representation can render a trial so fundamentally unfair as to violate the Fourteenth Amendment." 446 U.S. at 343; see also *id.* at 348.

[20] The court of appeals apparently believed that the instant case falls in the same category as *Powell*, *Geders*, and *Glasser*, for it did not require any showing that respondent's attorneys committed any specific errors or was prejudiced as a result. As we show below (see pages 35-47, *infra*), this conclusion was wholly unwarranted.

counsel that is free from improper external restraints, but rather to suggest a certain level of competence or performance of defense counsel. This Court has not directly addressed the circumstances under which the effectiveness of counsel's performance in this sense might furnish an independent basis under the Consitution for setting aside a conviction. However, in *McMann* v. *Richardson*, 397 U.S. 759 (1970), the Court did consider the quality of counsel's performance indirectly, insofar as it bore on the ultimate issue in the case: whether a guilty plea could be collaterally attacked on the ground that it allegedly was motivated by a prior coerced confession that the defendant feared might be used against him if he elected to go to trial. See 397 U.S. at 760, 769. The Court held that the only way in which the defendant could attack the validity of the guilty plea in such circumstances would be to show that it was not knowingly and intelligently made, and it stated that the plea would be regarded as not intelligently made only if the defendant could show that he "was incompetently advised by his attorney." 397 U.S. at 772. The Court observed in this regard that pleading guilty entails the inherent risk that the assessment of the facts and law by a reasonably competent attorney with respect to the admissibility of the confession might turn out to be mistaken. *Id.* at 770, 771. It therefore stressed that whether a plea was intelligently made depends not on whether a court would retrospectively consider counsel's advice to be right or wrong, "but on whether that advice was within the range of competence demanded of attorneys in criminal cases." *Id.* at 770.[21]

The *McMann* Court declined to furnish a more precise description of the acceptable range of competence of de-

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[21] Compare *Youngberg* v. *Romeo*, *supra*, 457 U.S. at 323 (footnotes omitted): "the decision, if made by a professional, is presumptively valid; liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment."

fense counsel for purposes of assessing the validity of a guilty plea, concluding that "the matter, for the most part, should be left to the good sense and discretion of the trial courts" (*id.* at 771). But the Court emphasized that in order to have his conviction set aside, the defendant must "demonstrate gross error" (*id.* at 772) or "serious derelictions on the part of counsel" (*id.* at 774). The Court has reiterated the approach in *McMann* in other guilty plea cases. See *Parker* v. *North Carolina*, 397 U.S. 790, 797 (1970); *Tollett* v. *Henderson*, 411 U.S. 258, 264, 266-268 (1973).

Because the ultimate issue in *McMann* was whether the guilty plea was intelligently made, not the adequacy of counsel's performance as such,[22] it is unclear to what extent *McMann* may be relied upon in formulating standards for setting aside a conviction on the basis of asserted inadequacies in counsel's performance standing alone. However, the courts of appeals, in attempting over the last decade to define the concept of ineffective assistance of counsel insofar as it refers to the level of counsel's competence, have for the most part sought guidance from the decision in *McMann*.

With the exception of the Second Circuit, the courts of appeals have ceased to articulate the test of ineffectiveness in terms of whether counsel's assistance rendered the trial a "farce and mockery of justice," [23] and they instead have adopted formulations that echo the "reasonable competence" or "range of competence" language in *McMann*.

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[22] Similarly, in *Michel* v. *Louisiana*, 350 U.S. 91, 100-101 (1955), the question whether the defendant received effective assistance of counsel was relevant to the extent it bore on the ultimate question whether the defendant had an adequate opportunity to object to the composition of the grand jury. See also *Reece* v. *Georgia*, 350 U.S. 85, 90 (1955).

[23] "A lack of effective assistance of counsel must be of such a kind as to shock the conscience of the Court and make the proceedings a farce and mockery of justice." *United States* v. *Wight*, 176 F.2d 376, 379 (2d Cir. 1949), cert. denied, 338 U.S. 950 (1950).

See *Romero* v. *United States*, No. 81-6463 (Oct. 12, 1982) (White, J., dissenting from denial of certiorari). But, again echoing *McMann*, the decisions of the courts of appeals generally stress that the defendant must show "gross" or "flagrant" error, "serious derelictions," or some comparable degree of mistake.[24] The courts of appeals also generally require a showing of prejudice, although there is some disagreement about the formulation of the prejudice element; that is the principal issue before the Court in *Strickland* v. *Washington*, cert. granted, No. 82-1554 (June 6, 1983).[25]

Because under the "reasonable competence" formulation the defendant still must show "serious derelictions" and resulting prejudice, it is not clear that the movement away from the "farce and mockery" language actually has changed the outcome in any significant number of cases, as the en banc Ninth and Tenth Circuits realized when they adopted a new formulation. See *Dyer* v. *Crisp*, 613 F.2d 275, 278, cert. denied, 445 U.S. 945 (1980); *Cooper* v. *Fitzharris*, *supra*, 586 F.2d 1329. Rather, as Judge Leventhal noted in his plurality opinion in *Decoster*, the differing language in the opinions may be little more than a "semantic merry-go-round." 624 F.2d at 206.

In any event, faithfulness to the text of the Sixth Amendment requires that before a conviction may be set aside because of asserted inadequacies in counsel's performance, the errors must be equivalent in their level of seriousness to an actual denial of the "Assistance of Counsel," to which the Amendment explicitly refers. As we have explained above, this has been the Court's approach in the other areas in which it has considered whether counsel's assistance was "effective." In *Powell* v. *Alabama*, for example, the Court concluded that al-

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[24] We have collected these cases from the federal courts of appeals in Appendix B, *infra*, 3a-6a.

[25] The federal appellate cases concerning the prejudice issue are collected in Appendix C, *infra*, 7a-10a.

though counsel had been formally assigned to represent the accused, there was in substance no "Assistance of Counsel" rendered because of the timing and circumstances of the appointment. There was, in other words, a constructive denial of the right to counsel. See *Decoster*, *supra*, 624 F.2d at 222 (MacKinnon, J., concurring). The defect in the conflict of interest cases, such as *Glasser* v. *United States* and *Cuyler* v. *Sullivan*, was analytically the same.

So too, in *McMann*, advice of counsel that is so deficient that it causes the client's guilty plea not even to be an intelligent act can be viewed as equivalent in its gravity to an outright denial of the "Assistance of Counsel." Moreover, because the ultimate question in *McMann* was whether counsel's advice rendered the defendant's guilty plea unintelligent, *McMann* supports the proposition that the primary focus of the inquiry must be on the substantial rights of the accused, rather than on the abilities and performance of the attorney in their own right.

The decision in *McMann* also is consistent with a requirement that the defendant show that any errors committed by counsel had a likely effect on the outcome of the prosecution or otherwise substantially prejudiced him and that the ultimate concern should be with the fairness of the proceedings. A defendant whose conviction has been shown to rest on a plea of guilty that was not intelligently made has sufficiently demonstrated that the actions of counsel had a probable effect on the outcome of the prosecution and substantially prejudiced him. The vacating of the judgment of conviction entered on the basis of that plea therefore would be an appropriately tailored remedy to remove the taint of counsel's incompetence. Compare *United States* v. *Hastings*, *supra*, slip op. 6-8; *United States* v. *Morrison*, *supra*, 449 U.S. at 364-365. And, finally, to preserve a conviction entered on the basis of a guilty plea that was not intelligently made would be "fundamentally unfair" to the accused, irrespective of whether derelictions of counsel or something else caused the problem.

There is, however, no need to determine in this case the precise nature of the inquiry into whether a conviction must be set aside because of asserted inadequacies in counsel's performance. At a minimum, *McMann* and the decisions of the lower courts require that the defendant identify specific and serious derelictions in counsel's performance and demonstrate some degree of prejudice as a result. Yet, in the instant case, the court of appeals reversed respondent's convictions on the ground of ineffective assistance of counsel without identifying *any* errors committed by attorneys Colston and Rivas in their representation of respondent, much less errors that caused their performance to fall below "the range of competence demanded of attorneys in criminal cases." Nor did the court demonstrate any resulting prejudice or unfairness to respondent. The court instead simply "inferred" that counsel's assistance was constitutionally inadequate based on the existence of certain "circumstances" that in themselves are not measures of the adequacy of a lawyer's actual performance. As we now explain, these factors are wholly inadequate to sustain respondent's burden of overcoming the presumption that his attorneys rendered competent assistance.

C. The Circumstances Relied Upon By The Court Of Appeals Do Not Support Its Finding Of Ineffectiveness

1. *There Was Adequate Time To Prepare For Trial*

In inferring that counsel rendered inadequate assistance, the court of appeals placed substantial reliance on the fact that counsel had 25 days to prepare for trial, a period of time the court apparently believed was insufficient. See Pet. App. 4a. The court's reliance on this factor is flatly inconsistent with prior decisions of this Court, including, most recently, *Morris* v. *Slappy*, *supra*.

In *Chambers* v. *Maroney*, the defendant claimed that the appearance on the day of his second trial of a Legal Aid Attorney other than the one who represented him at

his first trial was so belated that the attorney could not have furnished effective assistance of counsel. 399 U.S. at 53-54. The Court rejected this contention, noting that the defendant's claim of prejudice resulting from the substitution of counsel was "without substantial basis" and that the Court was "not disposed to fashion a *per se* rule requiring reversal of every conviction following tardy appointment of counsel" (*id.* at 54). See also *Morris* v. *Slappy*, *supra*, slip op. 9-10; *Mancusi* v. *Stubbs*, 408 U.S. 204, 214 (1972).

The substitution of counsel in this case a full 25 days prior to trial cannot be said to have been "tardy," especially when compared with the facts of *Chambers* v. *Maroney*; and as in *Chambers* v. *Maroney*, there was no finding by the courts below that respondent was at all prejudiced by the timing of the substitution of counsel and trial. Indeed, when Colston first was appointed to represent respondent, the date of the trial was postponed in response to Colston's request for a continuance. Colston requested that a minimum of 30 additional days be allowed prior to trial, but the court cut the continuance "a few days short" so that the trial could begin on the first day of the court's monthly docket (J.A. 35-36). No objection was lodged against this short reduction of the requested continuance, nor did respondent or counsel subsequently ask for a further continuance on the ground that inadequate time was available for trial preparation.

The Court observed in *Avery* v. *Alabama*, *supra*, 308 U.S. at 446, that "[s]ince the Constitution nowhere specifies any period which must intervene between the required appointment of counsel and trial, the fact, standing alone, that a continuance has been denied, does not constitute denial of the constitutional right to assistance of counsel." In *Avery* itself, moreover, the Court, in an unanimous opinion by Justice Black, sustained a state murder conviction in which the defendant was sentenced to death, even though the trial was held only three days after arraignment and appointment of counsel and despite the trial

court's denial of counsel's request for a continuance based on counsel's affidavits stating that they did not have sufficient time to prepare for trial. The Court noted that counsel had performed their duties well and that there was no indication that the attorneys could have done more had additional time been granted. 308 U.S. at 450, 452.

We may assume that the usual practice today would be to allow counsel more preparation time than the three days permitted in *Avery*, especially in a capital case.[26] Nevertheless, the decisions in *Avery* and *Chambers* v.

[26] The Speedy Trial Act, as amended in 1979 (Pub. L. No. 96-43, Section 2, 93 Stat. 327), provides that "[u]nless the defendant consents in writing to the contrary, the trial shall not commence less than thirty days from the date on which the defendant first appears through counsel or expresaly waives counsel and elects to proceed pro se." 18 U.S.C. (Supp. V) 3161(c)(2). The purpose of this provision is to ensure the defendant a minimum amount of preparation time in even the simplest case. See A. Partridge, *Legislative History of Title I of the Speedy Trial Act of 1974*, at 70-75 (Fed. Judicial Center 1980); *United States* v. *Mers*, 701 F.2d 1321, 1333 (11th Cir. 1983).

This requirement was fully satisfied here. Section 3161(c)(2) "guarantee[s] to the criminal defendant the right to a delay of at least 30 days between arraignment and trial". *United States* v. *Wooten*, 688 F.2d 941, 950-951 (4th Cir. 1982). Respondent appeared for arraignment with his retained counsel, Levine, on February 22, 1980, and his trial did not commence until July 14, 1980—almost five months later.

In addition to enacting the automatic 30-day trial preparation provision in 1979, Congress recognized that additional preparation time would be needed in some cases. Congress therefore also amended the Act (see Pub. L. No. 96-43, Section 5(c), 93 Stat. 328) to permit an additional discretionary continuance "in the ends of justice" to afford defense counsel "reasonable time necessary for effective preparation." 18 U.S.C. (Supp. V) 3161(h)(8)(B)(iv). This Section, however, does not alter the principles that the grant or denial of a continuance is a matter addressed to the sound discretion of the trial court and that denial of a request for a continuance warrants reversal only upon a showing of resulting prejudice. See *United States* v. *Brooks*, 697 F.2d 517, 522 (3d Cir. 1982); *United States* v. *Black*, 684 F.2d 481, 485 (7th Cir.), cert. denied, No. 82-5600 (Nov. 29, 1982); *United States* v. *Aviles*, 623 F.2d 1192, 1196 (7th Cir. 1980).

Maroney must foreclose any argument in this case that the scheduling of the trial—after the court *granted* all but a few days of the requested continuance—violated respondent's right to the assistance of counsel, at least without a showing, entirely absent here, of a clear abuse of discretion and substantial prejudice.[27] Indeed, the Tenth Circuit itself previously has recognized these principles in sustaining the *denial* of a continuance that was requested in order to allow counsel adequate time to prepare. *United States* v. *Gonzales-Palma*, 645 F.2d 844 (10th Cir.), cert. denied, 454 U.S. 861 (1981) (defendant must show "clear abuse of discretion resulting in manifest injustice"); *United States* v. *Schwanke*, 598 F.2d 575, 579 (10th Cir. 1979).

Just this past Term, this Court again stressed that "[t]rial judges necessarily require a great deal of latitude in scheduling trials," and that only an "unreasoning and arbitrary 'insistence upon expeditiousness in the face of a justifiable request for delay,' violates the right to the assistance of counsel." *Morris* v. *Slappy*, *supra*, slip op. 9-10, quoting *Ungar* v. *Sarafite*, 376 U.S. 575, 589 (1964). In the instant case, the trial court's accommodation of respondent's request for a continuance and the court's trial schedule was in no way "unreasoning and arbitrary." Furthermore, on the first day of trial, Colston stated that he was "ready" to proceed (Tr. 3). "In the face of the unequivocal and uncontradicted statement by a responsible officer of the court that he was fully prepared and 'ready' for trial," it was entirely proper for the court to proceed. *Morris* v. *Slappy*, *supra*, slip op. 10; see also *id.* at 4 (Brennan, J., concurring in the result).

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[27] See *United States* v. *Rodriguez-Ramos*, 704 F.2d 17 (1st Cir. 1983), petition for cert. pending, No. 82-1837; *United States* v. *Wuagneux*, 683 F.2d 1343, 1355-1356 (11st Cir. 1982), petition for cert. pending, No. 82-1687; *United States* v. *McDonald*, 672 F.2d 864 (11th Cir. 1982); *United States* v. *Badwan*, 624 F.2d 1228, 1231 (4th Cir. 1980), cert. denied, 449 U.S. 1124 (1981); *United States* v. *Berkwitt*, 619 F.2d 649, 659 (7th Cir. 1980).

2. *Counsel's Inexperience Did Not Justify A Finding Of Ineffectiveness*

The court of appeals also relied on the fact that attorney Colston did not have prior experience—at least substantial experience—in criminal trials. Pet. App. 5a. We do not dispute that inexperience is a factor that in turn could contribute to a lawyer's rendering inadequate assistance and that a trial court should assure itself that the attorney assigned to represent a defendant is capable of doing so.[28] "Nonetheless, in determining whether there has been effective assistance, the primary focus must be on how well counsel performed in the particular case, not on how much experience counsel had. Counsel may sometimes compensate for their lack of experience by unusual zeal and industry. Moreover, courts recognize that 'law school does not endow the young lawyer with all of the skills, abilities and "know-how" of the experienced advocate' and that the young attorney 'must gain experience somewhere, somehow, and sometime.'" *Harris* v. *Housewright*, 697 F.2d 202, 205 (8th Cir. 1982) (citations and footnote omitted), quoting *Smotherman* v. *Beto*, 276 F. Supp. 579, 589 (N.D. Tex. 1967).

Accordingly, where counsel was inexperienced, the defendant nevertheless is not entitled to relief unless he can show an "actual adverse impact upon the fairness of the trial resulting from counsel's lack of trial experience" or "specific omissions by counsel indicating a lack of preparation and degree of skill reasonably required of counsel in a criminal case." *Daniels* v. *Maggio*, 669 F.2d 1075, 1082 (5th Cir. 1982), cert denied, No. 81-6858 (Nov. 1, 1982).[29] The court of appeals in this

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[28] See Project on Standards for Criminal Justice, Standard Relating to Providing Defense Service § 2.2 and commentary at 27-29 (Approved Draft 1968).

[29] See also *United States* v. *Badolato*, 701 F.2d 915, 926 (11th Cir. 1983); *United States* v. *Easter*, 539 F.2d 663, 666 (8th Cir. 1976), cert. denied, 434 U.S. 844 (1977); *United States ex rel. Williams* v. *Twomey*, 510 F.2d 634, 638-639 (7th Cir.), cert. denied, 423 U.S. 876 (1975).

case made no finding that Colston's lack of experience in criminal trials in turn caused his performance to fall below the range of competence required of attorneys in criminal cases or even that it caused him to commit any errors at all. Indeed, as we have recited in the Statement (see pages 6-7, *supra*), the trial judge—who, unlike the court of appeals, had an opportunity to observe Colston and Rivas—repeatedly praised their performance (J.A. 94-97, 104). So did respondent (J.A. 94-95, 97), until the jury returned a verdict of guilty (J.A. 97).

The court of appeals also ignored the fact that Colston was assisted by Rivas, who, according to an uncontradicted affidavit filed by the government in the court of appeals, had extensive prior experience in criminal cases (App. A, *infra*, 1a).[30] This indicates that to the extent

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[30] The court of appeals' failure to consider the role of Rivas, and the government's need to rely on an affidavit filed in the court of appeals, highlight the inappropriateness of deciding a claim of incompetent assistance of counsel on direct appeal, without the benefit of an evidentiary record. Resolution of a claim of ineffective assistance of counsel often depends on the circumstances of the particular case, including the facts known to the accused and counsel as well as counsel's reasons for taking or not taking certain actions. An evidentiary record ordinarily would have to be developed on these points before a court could conclude that counsel's assistance had been ineffective. (A court might more readily *reject* a claim of ineffective assistance without a hearing, at least where no substantial claim of prejudice is made. See *Chambers* v. *Maroney*, *supra*, 399 U.S. at 59).

For this reason, other courts of appeals have recognized that claims of ineffective assistance of counsel should be presented to the district court in the first instance, either in a motion for a new trial (if made within the time limits permitted by Fed. R. Crim. P. 33) or in a proceeding under 28 U.S.C. 2255. See *United States* v. *Frankenberry*, 696 F.2d 239, 242 (3d Cir. 1982), cert. denied, No. 82-6256 (June 27, 1983); *United States* v. *Badolato*, *supra*, 701 F.2d at 925; *United States* v. *Strum*, 671 F.2d 749, 750-751 (3d Cir.), cert. denied, No. 81-6689 (Oct. 4, 1982); *United States* v. *Lurz*, 666 F.2d 69, 78 (4th Cir. 1981), cert. denied, 455 U.S. 1005 (1982); *United States* v. *Barham*, 666 F.2d 521, 524 (5th Cir.), cert. denied, 456 U.S. 947 (1982); *United States* v. *Phillips*, 664

Colston might have believed it would be unwise for him to handle respondent's defense by himself, he fulfilled his ethical obligation by associating an experienced attorney with him in the case. See Model Code of Professional Responsibility DR 6-101(A)(1) (1978); Project on Standards for Criminal Justice, Standards Relating to Providing Defense Services § 2.2 comment f (Approved Draft 1968).

3. *The Finding Of Ineffectiveness Was Not Justified By The Complexity Of The Case*

The court of appeals made no substantial effort to assess the complexity of this case or the ability of Colston and Rivas to grasp it in the time allowed. The Court simply counted the number of witnesses (17) and exhibits (50) in the case, and, on that basis, found it to be "apparently" less complex than the trial involved in its prior decision in *United States* v. *King*, *supra*, in which there had been 200 witnesses and 5000 exhibits. Pet. App. 5a. But the court did not find the comparatively less complexity to be a reason for a different result here, because, in the court's view, this case "was not an

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F.2d 971 (5th Cir. 1981), cert. denied, 457 U.S. 1136 (1982); *United States* v. *Aulet*, 618 F.2d 182, 185-186 (2d Cir. 1980); *United States* v. *Payton*, 615 F.2d 922, 925 (1st Cir.), cert. denied, 446 U.S. 969 (1980); *United States* v. *Gray*, 611 F.2d 194, 197 (7th Cir. 1979), cert. denied, 446 U.S. 911 (1980).

Because no evidentiary record had been developed in this case, the court of appeals, if it was not prepared to reject respondent's unsubstantiated claims altogether, should have declined to reach the issue, without prejudice to respondent's raising it in a proceeding under 28 U.S.C. 2255. This clearly is a more appropriate procedure when a claim of ineffective assistance of counsel is raised for the first time on appeal than remanding to the district court for further proceedings, as the Tenth Circuit did in *United States* v. *Golub*, 638 F.2d 185 (1980). After proceedings on remand in *Golub*, the court of appeals reversed its prior decision and reinstated the conviction (694 F.2d 207 (1982)), but in the meanwhile the finality of the conviction had been delayed for more than two years.

ideal one for an aspiring criminal defense lawyer to cut his teeth on," since " '[m]ail fraud cases tend to be factually and legally complex.' " Pet. App. 5a, quoting *United States* v. *Golub*, *supra*, 638 F.2d at 188. This reasoning is wholly unsatisfactory.

The question before the court of appeals was not whether this was an "ideal" case for Colston to handle, but rather whether respondent received constitutionally adequate legal assistance. The court of appeals pointed to nothing to suggest that he did not, and it also overlooked the assistance that respondent and Colston received from Rivas, who evidently was an experienced—not "aspiring"—criminal defense lawyer, and who therefore presumably was capable of handling cases that were not "ideal."

Nor was it significant whether mail fraud cases generally "tend" to be complex. The offense of mail fraud broadly embraces any fraudulent scheme or artifice—regardless of complexity or simplicity—coupled with use of the mails "for the purpose of executing such scheme." 18 U.S.C. 1341. See, *e.g.*, *United States* v. *Maze*, 414 U.S. 395, 400 (1974); *Pereira* v. *United States*, 347 U.S. 1, 8 (1954). The relevant inquiry therefore was whether *this* case was too complex to be prepared for trial within 25 days. Plainly it was not. As we have explained in the Statement (see page 4, *supra*), the fraud established by the government's evidence consisted of a relatively simple check-kiting scheme involving a series of similar transactions. Counsel apparently concluded that the only plausible defenses were to disassociate respondent from the check writing or to dispel the inference of fraudulent intent, and Colston pursued both of these lines of defense. No one has suggested the availability of any markedly superior line of defense. Moreover, neither the government's case nor the defense presented to that case raised issues of unusual complexity or required extensive experience in defending fraud cases.

4. *The Gravity Of The Charges Does Not Justify The Finding Of Ineffectiveness*

The court of appeals observed that respondent faced a sentence of up to 65 years' imprisonment and in fact was sentenced to a term of 25 years, as compared with the five-year sentence faced by the defendant in *King*. It is not apparent why the court of appeals believed that this comparison of the two cases supported an "inference" of ineffective assistance of counsel in the instant case. Respondent faced a maximum of 65 years imprisonment only because he was charged with a course of conduct involving 13 separate counts of mail fraud, each of which carried a maximum five-year sentence. See 18 U.S.C. 1341. Moreover, this Court has recognized that the difficulty of a case and the need for the special skills of counsel are not necessarily proportional to the severity of the potential sentence. See *Argersinger* v. *Hamlin*, *supra*, 407 U.S. at 33-34, 36-37; *id.* at 41 (Burger, C.J., concurring in the result); *id.* at 47-48 (Powell, J., concurring in the result).

It may well be that in common practice, a lawyer would—and should—devote particular effort to a case in which the consequences of conviction are severe. But even if the Sixth Amendment could be said to impose a somewhat more exacting standard of attorney performance when the potential penalty is unusually severe—a principle that would be difficult to interpret and apply[31]—there

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[31] The Fifth Circuit, in rejecting the contention that a higher standard for gauging competence should apply to capital cases or cases in which the defendant is exposed to lengthy confinement, observed that "[r]ecognition of a sliding scale for th[e] constitutional standard [of ineffective assistance of counsel] would also suggest, for example, that a defendant charged with aggravated assault would be entitled to a more effective lawyer than one charged with simple assault or public intoxication. We decline to embark on such a treacherous path." *Washington* v. *Watkins*, 655 F.2d 1346, 1357 n.18 (1981), cert. denied, 456 U.S. 949 (1982). See also *Washington* v. *Strickland*, *supra*, 693 F.2d at 1250 n.12; cf. *Avery* v. *Alabama*, *supra*. While it is arguable that the qualitative difference

is no indication in this case that the efforts of Colston and Rivas were not appropriately commensurate to the gravity of the offense.

5. *The Location Of Witnesses Has Not Been Shown To Have Impaired The Effectiveness Of Respondent's Trial Counsel*

The final factor considered by the court of appeals was the accessibility of witnesses to counsel. Because this factor was not considered in *King*, the court of appeals was unable to compare the two cases on this point. The court therefore simply observed: "In [respondent's] case no defense witnesses appeared, but the government's witnesses came from four different states. [Respondent] lived in Florida and Georgia, his attorney in Oklahoma." Pet. App. 5a. This recitation—the court's complete discussion of the point—clearly lends no support to an inference of constitutionally inadequate assistance. There was no finding that Colston and Rivas in fact were unable to confer with respondent and interview witnesses or otherwise learn the substance of the information they possessed, or, if Colston and Rivas were unable to do so, that respondent was prejudiced as a result.

D. The Court Of Appeals Erred In Believing It Would Be Inappropriate To Require A Showing Of Specific Errors By Counsel

The court of appeals acknowledged that respondent had not shown that trial counsel had "failed to exercise 'the skill, judgment and diligence of a reasonably competent defense attorney', which is how the Sixth Amendment right to assistance of counsel is described in [the Tenth] Circuit." Pet. App. 3a, quoting *Dyer* v. *Crisp*, *supra*, 613

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in potential penalty in capital cases supports a higher standard for assessing the constitutional effectiveness of counsel's performance, we doubt it is justifiable to extend any such principle to cases on the basis of the length of the potential term of imprisonment that could result from conviction.

F.2d at 278. But it explained its decision to dispense with that requirement here, and instead to "infer" inadequate assistance based on the five factors discussed above, as follows (Pet. App. 3a):

> Cases after *Dyer* have established that when circumstances hamper a given lawyer's preparation of a defendant's case, the defendant need not show specified errors in the conduct of his defense in order to show ineffective assistance of counsel. See *United States* v. *King*, 664 F.2d 1171, 1172-73 (10th Cir. 1981); *United States* v. *Golub*, 638 F.2d 185, 187 (10th Cir. 1980). This is an eminently reasonable rule, for there is no way an appellate court can say precisely how a given case would have been handled by a reasonably diligent and properly prepared lawyer. The prejudice from lack of preparation and experience cannot be nicely weighed.

The factual premises on which the court rested its analysis are wholly unsubstantiated: there simply has been no showing or finding that Colston and Rivas's preparation of the case was at all "hampered" by circumstances; that there was a "lack of preparation" or (in light of Rivas' apparent prior experience in criminal cases) a "lack of * * * experience"; or that Colston and Rivas were not "reasonably diligent and properly prepared lawyer[s]." There was, accordingly, no reason on this record for the court to invoke a novel Sixth Amendment rule that dispenses with a requirement that the defendant show specific errors in counsel's performance and resulting prejudice. See *Morris* v. *Slappy*, *supra*, slip op. 12-13; *id.* at 3 (Brennan, J., concurring in the result); *id.* at 1 (Blackmun, J., concurring in the judgment).

In any event, the court of appeals' analysis would be gravely flawed even if its factual premises were correct. A factual determination that circumstances did bring some temporal or other pressures to bear on the attorneys in their preparation of the case would not serve to distinguish this case from most criminal cases. In light

of this reality, it is clear that "[n]ot every restriction on counsel's time or opportunity to investigate or to consult with his client or otherwise to prepare for trial violates a defendant's Sixth Amendment right to counsel." *Morris* v. *Slappy*, *supra*, slip op. 9. As we have explained above (see pages 15, 27-28, 36-37, *supra*), only where the timing or other circumstances of counsel's appointment were such that an opportunity for consultation and preparation was precluded, as in *Powell* v. *Alabama*, may a court set aside a conviction without identifying specific errors by counsel and finding substantial prejudice to the accused as a result. Because this case in no way resembles *Powell* v. *Alabama* with regard to the timing of the appointment of counsel, the proper question in this case was not whether Colston and Rivas's preparation of the case was "hampered," but whether the representation respondent ultimately received was constitutionally adequate.

Nor, contrary to the court of appeals' apparent belief (see Pet. App. 3a), would it be inappropriate or unfair to require respondent to make a showing that his lawyers' performance was outside the range of competence demanded of attorneys in criminal cases. If the basis of a defendant's claim is that the lawyer who represented him did not adequately prepare, he should be capable of demonstrating the nature of counsel's omissions that resulted from the asserted lack of preparation—*e.g.*, by identifying a witness who should have been, but was not, interviewed and called to testify; evidence that might have been unearthed with greater diligence; motions or objections that would have been made by a more attentive lawyer; or a basis for impeaching government witnesses that might have been developed. See *Morris* v. *Slappy*, *supra*, slip op. 12-13 (Brennan, J., concurring in the result). This is information to which the defendant has or could develop access. Compare *United States* v. *Valenzuela-Bernal*, *supra*, slip op. 11-13, 14. If the defendant cannot make such a showing, then the asserted

lack of preparation cannot be said to have rendered counsel's assistance "ineffective," because it could not be shown even to have had an effect on the presentation of the defense.[32] The District of Columbia Circuit stressed this point in its seminal en banc decision in *United States* v. *Decoster, supra.* There the court rejected the dissenting judges' emphasis on specific duties of counsel in the abstract and held instead that an asserted failure to investigate—a concrete example of a failure to prepare that was shown there but was not found there—must be considered in terms of whether there was any resulting impact on the prospects for a successful defense at trial. 624 F.2d at 208-213, 215-217 (plurality opinion); *id.* at 232-234, 244-245 (concurring opinion). See also *Washington* v. *Strickland, supra,* 693 F.2d at 1258-1262.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
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STEPHEN S. TROTT
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JOHN FICHTER DE PUE
Attorney

AUGUST 1983

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[32] Of course, the defendant also would have to show that any errors he did identify were "serious derelictions" and that he was substantially prejudiced as a result.

APPENDIX A

AFFIDAVIT OF RYLAND L. RIVAS

STATE OF OKLAHOMA)
) ss:
COUNTY OF GRADY)

The undersigned Affiant, by request of the United States Attorney's Office, Western District of Oklahoma, makes the following statements:

That he has been in the practice of law since May, 1974, and is admitted to the Bar of the State of Oklahoma, and is a member in good standing of the United States District Court for the Western District of Oklahoma and the U.S. Court of Appeals for the Tenth Circuit.

Affiant further states that prior to the year of 1980, he has had extensive experience in the practice of criminal law and has tried jury cases ranging from escape from the penitentiary to murder in the 1st degree. Affiant further states that he has attended numerous schools and continuing education courses regarding the trial of criminal matters including attendance of the National Criminal Defense Lawyers Trial Advocacy Program located in Houston, Texas.

Affiant further states that he assisted Mr. Chris Colston in his preparation of defense for Harrison Cronic and was present during all stages in the proceedings to assist Mr. Colston with the preparation and drafting of motions, examination of witnesses and examination of all evidence available to Mr. Colston.

Further Affiant saith not on this 20th day of May, 1982.

/s/ Ryland L. Rivas
RYLAND L. RIVAS

Subscribed and sworn to before me this 20th day of May, 1982.

/s/ Karen Bell
Notary Public

My Commission Expires:
October 16, 1983.

APPENDIX B

SURVEY OF THE DECISIONS OF THE COURTS OF APPEALS REGARDING THE STANDARD TO BE EMPLOYED IN ESTABLISHING INEFFECTIVE ASSISTANCE OF COUNSEL

DISTRICT OF COLUMBIA: *United States* v. *Decoster*, 624 F.2d 196, 208 (en banc) (plurality opinion), cert. denied, 444 U.S. 944 (1979) ("serious incompetency that falls measurably below the performance ordinarily expected of fallible lawyers"; "gross shortfall"): *United States* v. *Wood*, 628 F.2d 554, 559 (1980) (en banc) (same); *United States* v. *Green*, 680 F.2d 183, 188 (1982), cert. denied, No. 82-5552 (Feb. 22, 1983).

FIRST: *United States* v. *Bosch*, 584 F.2d 1113, 1121 (1978) ("reasonably competent assistance" standard is "shorthand" for "assistance within the range of competence expected of attorneys in criminal cases"; convicted defendant must show that error "clearly resulted from neglect or ignorance rather than from informed, professional deliberation"); *United States* v. *Talavera*, 668 F.2d 625, 632 (1982) (same); *United States* v. *Garcia*, 698 F.2d 31, 33-35 (1983) (same); *Cepulonis* v. *Ponte*, 699 F.2d 573, 575 (1983) (same).

SECOND: *United States* v. *Wight*, 176 F.2d 376, 379 (1949), cert. denied, 338 U.S. 950 (1950) ("farce and mockery"); *United States* v. *Helgesen*, 669 F.2d 69, 71, cert. denied, 456 U.S. 929 (1982) (same); *Langone* v. *Smith*, 682 F.2d 287 (1982) (same); *Solina* v. *United States*, 709 F.2d 160, 162 (1983) (same).

THIRD: *Moore* v. *United States*, 432 F.2d 730, 736, 738 (1970) (en banc) (citing *Restatement (Second) of Torts* § 299(a): counsel required to exercise "the customary skill and knowledge which normally prevails at the time and place"; noting failure of counsel adequately to pursue "fundamental issue" of identification); *United States* v. *Baynes*, 687 F.2d 659, 665 (1982) (same; fail-

ure to investigate a "critical source of potentially exculpatory evidence"); *United States ex rel. Caruso* v. *Zelinsky*, 689 F.2d 435, 438 (1982) (same; alleged failure of counsel to advise client of plea bargain would constitute a "gross deviation from professional standards").

FOURTH: *Marzullo* v. *Maryland*, 561 F.2d 540, 544 (1977), cert. denied, 435 U.S. 1011 (1978) (whether "defense counsel's representation [was] within the range of competence demanded of attorneys in criminal cases"; counsel's error must be "so flagrant" that a court can conclude that it "resulted from neglect or ignorance rather than from informed, professional deliberation"); *Taylor* v. *Starnes*, 650 F.2d 38, 41 (1981) (same); *Sneed* v. *Smith*, 670 F.2d 1348, 1353, 1355 (1982) (same); *Knight* v. *Johnson*, 699 F.2d 162, 166 (1983) ("within the range of competence demanded of attorneys in criminal cases").

FIFTH: *Akridge* v. *Hopper*, 545 F.2d 457, 459, cert. denied, 431 U.S. 941 (1977) (defendant must demonstrate that counsel's advice was not "within the range of competency demanded of attorneys in criminal cases"); *Winfrey* v. *Maggio*, 664 F.2d 550, 553 (1981) (same); *Washington* v. *Watkins*, 655 F.2d 1346, 1355 (1981) ("counsel reasonably likely to render *and rendering* reasonably effective assistance" (emphasis in original)); *Hayes* v. *Maggio*, 699 F.2d 198, 201 (1983) (same). *Boyd* v. *Estelle*, 661 F.2d 388, 389 (1981) (same; counsel's performance must be "seriously inadequate"); *Uptain* v. *United States*, 692 F.2d 8, 9-10 (1982) (same).

SIXTH: *Beasley* v. *United States*, 491 F.2d 687, 696 (1974) (assistance of counsel required by the Sixth Amendment is "counsel likely to render and rendering reasonably effective assistance"; "defense counsel must perform at least as well as a lawyer with ordinary training and skill in the criminal law and must conscientiously protect his client's interest"); *Poole* v. *Perini*, 659 F.2d 730, 736 (1981) (same); *United States* v. *Warner*, 690

F.2d 545, 555 (1982) (same); *United States* v. *Yelardy*, 567 F.2d 863, 865, 866 (1978) ("whether petitioner was deprived of rudimentary legal assistance"; "within the range of competence demanded of attorneys in criminal cases").

SEVENTH: *United States ex rel. Williams* v. *Twomey*, 510 F.2d 634, 641, cert. denied, 423 U.S. 876 (1975) ("legal assistance which meets a minimum standard of professional representation"; there is no presumption of failure to meet a constitutional standard merely because counsel made "egregious errors, tactical or strategic"); *Alicea* v. *Gagnon*, 675 F.2d 913, 926 (1982) ("legal assistance which meets a minimum standard of professional representation"); *United States ex rel. Cosey* v. *Wolff*, 682 F.2d 691, 693 (1982) (same); *Clay* v. *Director, Juvenile Division*, 631 F.2d 516, 522 (1980) ("within the range of competence demanded of attorneys in criminal cases"); *United States ex rel. Edwards* v. *Warden*, 676 F.2d 254, 258 (1982) ("within the reasonable range of professional competence constitutionally required"); *United States* v. *Weston*, 708 F.2d 302, 306 (1983) ("legal assistance which meets a minimum standard of professional representation"; defendant must establish "grossly incompetent professional conduct" or "representation which is in any aspect • • • shockingly inferior to what may be expected of the prosecution's representation").

EIGHTH: *Reynolds* v. *Mabry*, 574 F.2d 978 (1978) ("reasonably competent lawyer"); *Long* v. *Brewer*, 667 F.2d 742, 745 (1982) ("behavior of counsel falling measurably below that which might be expected from an ordinary fallible lawyer"; defendant must show "serious incompetency, inefficiency, or inattention of counsel"); *Walker* v. *Solem*, 687 F.2d 1235, 1236-1237 (1982) (same; "failed to perform an essential duty"); *White Hawk* v. *Solem*, 693 F.2d 825, 827 (1982) (same; "presumption that counsel has rendered effective assistance"; "gross error").

NINTH: *Cooper* v. *Fitzharris*, 586 F.2d 1325, 1330 (1978) (en banc), cert. denied, 440 U.S. 974 (1979) ("within the range of competence demanded of attorneys in criminal cases"; "serious dereliction"); *United States* v. *Sanford*, 673 F.2d 1070, 1073 (1982) (same); *United States* v. *Gibson*, 690 F.2d 697, 703-704 (1982) ("reasonably competent and effective counsel"; "within the range of competence demanded of criminal attorneys in reasonably difficult cases").

TENTH: *Dyer* v. *Crisp*, 613 F.2d 275, 278 (en banc), cert. denied, 445 U.S. 945 (1980) (counsel must "exercise the skill, judgment and diligence of a reasonably competent defense attorney"); *United States* v. *Golub*, 694 F.2d 207, 213 (1982) (same); *United States* v. *Glick*, 710 F.2d 639, 644 (1983) (same; court must determine whether attorney's performance fell below the standard).*

ELEVENTH: *Mylar* v. *Alabama*, 671 F.2d 1299, 1301 (1982), cert. denied, No. 81-2240 (July 6, 1983); (within the "range of competence demanded of attorneys in criminal cases"); *Stanley* v. *Zant*, 697 F.2d 955, 958 (1983) (same); an "objective assessment of whether trial counsel fell below acceptable professional standards in not advocating the underlying claim"); *Washington* v. *Strickland*, 693 F.2d 1243, 1250 (former 5th Cir. Unit B 1982) (en banc), petition for cert. granted, No. 82-1554 (June 6, 1983) ("counsel reasonably likely to render and rendering reasonably effective assistance given the totality of circumstances").

*** The Tenth Circuit decisions do not include the decision in the instant case or in *United States* v. *King*, 664 F.2d 1171 (1981), or *United States* v. *Golub*, 638 F.2d 185 (1980), rev'd, 694 F.2d 207 (1982), which did not require a showing of specific errors by counsel because of the court's view that counsel's preparation was hampered.**

APPENDIX C

SURVEY OF THE DECISIONS OF THE COURTS OF APPEALS REGARDING THE REQUIREMENT THAT PREJUDICE BE SHOWN TO OBTAIN RELIEF ON A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL

DISTRICT OF COLUMBIA: *United States* v. *Decoster*, 624 F.2d 196, 20[illegible] (en banc) (plurality opinion), cert. denied, 444 U.S. 944 (1979) (accused must demonstrate "a likelihood that counsel's inadequacy affected the outcome of the trial"); *id.* at 232 (MacKinnon, J., concurring) ("substantial unfair prejudice to his defense"); *United States* v. *Wood*, 628 F.2d 554, 559 (1980) (en banc) (must show that counsel's performance was "likely to have resulted in prejudice to appellant's case"); *United States* v. *Hinton*, 631 F.2d 769, 771 (1980) (must show "a likelihood that counsel's inadequacy prejudiced his defense"); *United States* v. *Patterson*, 652 F.2d 1046, 1048 (1981) ("[n]o counsel, however skillful, could have 'affected the outcome' of this case"); *United States* v. *Green*, 680 F.2d 183, 189 (1982), cert. denied, No. 82-5552 (Feb. 22, 1983) ("likelihood of effect on the outcome").

FIRST: *United States* v. *Ritch*, 583 F.2d 1179, 1183, cert. denied, 439 U.S. 970 (1978); (accused "bears the burden of establishing actual prejudice"); *United States* v. *Campa*, 679 F.2d 1006, 1014 (1982) (same).

SECOND: *LiPuma* v. *Commissioner, Dep't of Corrections*, 560 F.2d 84, 92, cert. denied, 434 U.S. 861 (1977) ("the prejudice resulting from counsel's alleged neglect must be actual and not merely possible"); *United States* v. *Aulet*, 618 F.2d 182, 188 (1980) (same).

THIRD: *United States ex rel. Johnson* v. *Johnson*, 531 F.2d 169, 177-178, cert. denied, 425 U.S. 997 (1976) (noting that petitioner was not prejudiced by counsel's failure to locate witness); *United States* v. *Baynes*, 687 F.2d 659, 670-671 (1982) (habeas corpus petitioner must "demonstrate that there is a 'reasonable possibility' that

had the error of which he complains not occurred, the jury might have arrived at a different outcome"; must "demonstrate that his attorney's ineffectiveness was not harmless beyond a reasonable doubt"); *United States ex rel. Caruso* v. *Zelinsky*, 689 F.2d 435, 438 (1982) ("accused must be prejudiced by counsel's incompetence before relief will be granted").

FOURTH: *Marzullo* v. *Maryland*, 561 F.2d 540, 546 (1977), cert. denied, 435 U.S. 1011 (1978) (failure of counsel to protect defendant from "prejudicial" reference to prior rape charge); *Taylor* v. *Starnes*, 650 F.2d 38, 41 (1981) (court cannot conclude that counsel's failure to request lesser included offense instruction was "harmless beyond a reasonable doubt"); *Via* v. *Superintendent, Powhatan Correctional Center*, 643 F.2d 167, 175 (1981) (noting that defendant was prejudiced by counsel's lack of preparation for trial, which led him to plead guilty).

FIFTH: *Washington* v. *Watkins*, 655 F.2d 1346, 1362 (1981) (noting that at time of the decision, it was "clear that *some* degree of prejudice must be shown," but that it was then "unclear as to the precise *degree* of prejudice that a defendant must demonstrate" (emphasis in original)); *Boyd* v. *Estelle*, 661 F.2d 388, 389 (1981) (relevant inquiry is "whether counsel's inadequacy prejudiced the fairness of his client's trial"); *Uptain* v. *United States*, 692 F.2d 8, 10 (1982) (same); *Rubio* v. *Estelle*, 689 F.2d 533, 535 (1982) (habeas corpus petitioner must show an "adverse impact upon the fairness of her trial resulting from [counsel's] lapse"); *Youngblood* v. *Maggio*, 696 F.2d 407, 409-410 (1983) (habeas petitioner must show counsel's performance "was so inadequate as to render his trial unfair").

SIXTH: *Beasley* v. *United States*, 491 F.2d 687, 696 (1974) ("Harmless error tests do not apply in regard to the deprivation of a procedural right so fundamental as the effective assistance of counsel"); *McKeldin* v. *Rose*, 631 F.2d 458, 460-461 (1980), cert. denied, 450 U.S. 969

(1981) (same); *Wiley* v. *Sowders*, 647 F.2d 642, 650, cert. denied, 454 U.S. 1091 (1981) ("question remains open whether an adjudication of ineffective assistance requires a showing that defense counsel's performance affected the outcome").

SEVENTH: *United States* v. *Berkwitt*, 619 F.2d 649, 659 (1980) (claim of ineffectiveness unsupported by "any specific instance of prejudice"); *United States* v. *Murzyn*, 631 F.2d 525, 534 (1980), cert. denied, 450 U.S. 923 (1981) ("in the absence of prejudice," counsel's failure to read leading entrapment decision was not ineffective assistance); *United States* v. *Berry*, 661 F.2d 618, 621 (1981) (noting that the evidence counsel elicited did not prejudice defendant); *Wade* v. *Franzen*, 678 F.2d 56, 59 (1982) ("harmless error" rule).

EIGHTH: *Long* v. *Brewer*, 667 F.2d 742, 745 (1982) (defendant must show "prejudice"—that he was "likely deprived * * * of an otherwise available, substantial ground of defense"); *Walker* v. *Solem*, 687 F.2d 1235, 1237 (1982) (defendant must show counsel's failure "prejudiced his defense"); *United States* v. *Kelly*, 687 F.2d 1217, 1219 (1982) (defendant must show that he "suffered material prejudice in the defense of his case"); *White Hawk* v. *Solem*, 693 F.2d 825, 827 (1982) (defendant must show "he was prejudiced by [counsel's] failure").

NINTH: *Cooper* v. *Fitzharris*, 586 F.2d 1325, 1331 (1978) (en banc), cert. denied, 440 U.S. 974 (1979) (relief granted "only if it appears that the defendant was prejudiced by counsel's conduct"); *Powell* v. *Spalding*, 679 F.2d 163, 167 (9th Cir. 1982) (same); *United States* v. *Gibson*, 690 F.2d 697, 704 (1982) (same); *Baumann* v. *United States*, 692 F.2d 565, 572 (1982) (same); *United States* v. *Altamirano*, 633 F.2d 147, 152-153 (1980), cert. denied, 454 U.S. 839 (1981) (counsel's many errors did not deprive defendant of a "fair trial"); *Fritchie* v. *McCarthy*, 664 F.2d 208, 214 (1981) ("touchstone" is whether defendant "received a fair trial").

TENTH: *Dyer* v. *Crisp*, 613 F.2d 275, 278 (en banc), cert. denied, 445 U.S. 945 (1980) (noting that defendant "was not prejudiced by trial mistakes"); *United States* v. *Porterfield*, 624 F.2d 122, 124-125 (1980) (where incompetence of counsel is "pervasive," the defendant is not required to prove "prejudice"; burden instead is on government to "establish the lack of prejudice"); *United States* v. *Payne*, 641 F.2d 866, 867-868 (1981) (noting the *Porterfield* holding that specific proof of prejudice is not required where incompetence is pervasive or in other unusual circumstances, but stating that this proposition is "questionable" in light of the subsequent decision in *United States* v. *Morrison*, 449 U.S. 361 (1981)); *United States* v. *Glick*, No. 82-1375 (June 10, 1983) slip op. 12-13 (quoting *United States* v. *Morrison*, *supra*: the court must "determine whether the inadequacy 'has had or threatens some adverse effect upon the effectiveness of counsel's representation or has produced some other prejudice to the defense' ").

ELEVENTH: *Washington* v. *Strickland*, 693 F.2d 1243, 1250 (former 5th Cir. Unit B 1982) (en banc), petition for cert. granted, No. 82-1554 (June 6, 1983) (petitioner "must show that ineffectiveness of counsel resulted in actual and substantial disadvantage to the cause of his defense").

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, *Petitioner*

v.

HARRISON P. CRONIC, *Respondent*

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether a Court of Appeals may reverse a conviction on direct appeal on the ground that the accused did not receive adequate representation without stating in its opinion that defense counsel was guilty of a specific dereliction and describing the manner in which such dereliction was prejudicial.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . .

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of Counsel for his defense.

18 United States Code Section 1341 provides in pertinent part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail . . . any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

STATEMENT OF FACTS

Introduction

Respondent was convicted and sentenced to serve twenty-five years in prison in a complex mail fraud case which took the government four and one-half years to prepare. He was compelled to meet the government's case, which involved eighteen witnesses and hundreds of documents, with the assistance of a wholly inexperienced real estate lawyer who was given less than 25 days, without motions or substantial expert assistance, to prepare. The defense lawyer, out of ignorance and ill preparedness, overlooked a very substantial defense that was apparent on the facts of the government's case and instead

pursued a ridiculous and legally untenable one. He made only ten objections during the trial, requested no Jencks Act material, made no requests to charge or objections to the charge, and permitted the case to go to the jury as one in which respondent had victimized a bank of more than $400,000 whereas in fact the bank had suffered no loss and had made a profit.

The Charges

On February 5, 1980, Respondent Cronic, Wylie Merritt and Carolyn Cummings were indicted in a thirteen count, fifteen page indictment charging mail fraud under 18 U.S.C. § 1341 and § 2 (aiding and abetting). Count 1 alleged that Skyproof Manufacturing Company was "largely a facade and pretense" to permit the defendants to float insufficient fund checks between banks in Norman, Oklahoma and Tampa, Florida to "create inflated or false balances in the various bank accounts" and that the defendants knew "there were not sufficient funds on deposit to cover said checks" (J.A. 11).

The indictment alleged that between June and October, 1975, defendants caused to be deposited in the Oklahoma bank $4,841,073.95 in checks and wire transfers drawn on the Tampa bank and that they "would and did represent" to the Oklahoma bank that "there were sufficient funds in the . . . account of the [Tampa bank] to pay the checks previously drawn," and they knew otherwise (J.A. 13).

Various portions of the indictment alleged that the purpose of the "scheme" was to induce the Oklahoma bank "to part with its funds and to convert and appropriate such funds to their own profit and use."

Each of the thirteen counts then alleged that, pursuant to the scheme, specific checks were mailed from an Oklahoma bank to a trust company in Chicago for clearance. These mailings, the indictment alleged, were "willfully and knowingly . . . caused to be" mailed by the defendants.

Despite its prolixity, the indictment did not specify any misrepresentations by any of the defendants other than that of

depositing the checks. Nor did the indictment state that the defendants intended to deprive permanently the Oklahoma bank of its money. No motion for particulars was filed.

Pretrial Proceedings

Respondent and Cummings were initially represented by Arnold Levine of Tampa, Florida. On June 6, 1980, however, Levine moved to withdraw as counsel for respondent on grounds of conflict of interest. Respondent objected *pro se*, asserting, *inter alia*, that if there was a conflict, it would not be cured by permitting Levine to represent only Cummings. Since Levine had represented them both since 1975 and prepared a joint defense, confidential communications from respondent to Levine could therefore be used against respondent in the representation of Cummings (Defs. motion to deny withdrawal of Arnold Levine, filed June 11, 1980).

At the hearing on Levine's motion to withdraw as respondent's lawyer, on June 19, 1981, a lawyer named Chris Colston introduced himself to the court. The court said:

> I haven't met him. I found him on the alphabetical list of eligible lawyers and I appointed him to represent Mr. Cronic, but I haven't met him. I talked to him on the phone (J.A. 26).

Later in the hearing, the judge explained that he had appointed Colston the previous week to represent respondent at the hearing on the motion to withdraw (J.A. 27). Respondent, expressing surprise, said that he had not even discussed the matter with Colston (J.A. 27) and therefore wished to examine Mr. Levine himself, which he did. Mr. Colston took no part in the hearing.

After brief testimony and arguments, the court decided to "shut this hearing down" (J.A. 31), declaring that there was too much animosity between Levine, Cummings and respondent to require Levine to continue to represent respondent. As to Levine's representation of Cummings, the court said, "I'm not saying yes or no with respect to that . . . I'm just saying

. . . it's impossible for anybody to try to represent both of you" (J.A. 32).

The court indicated that the trial would begin on June 30, eleven days hence (J.A. 33). Respondent replied:

> I don't feel like I could possibly get a fair defense giving my attorney one or two weeks to prepare for this when Mr. Levine has had the advantage of a five-year investigation, all the documentations, a complete review of all of that prior to my testimony before a federal grand jury in Tampa (J.A. 33).

The scheduling issue was deferred until the afternoon. At that time, Levine stated that he was prepared to proceed, on behalf of Cummings, but that the Government's documentation was "a foot and a half high if not two feet high" and counsel for Cronic hadn't even seen it:

> It constitutes hundreds and hundreds of checks and thousands of entries and some of the witnesses . . . are . . . from Florida . . . I would respectfully submit . . . that if counsel for Mr. Cronic were to devote all his working days, he might be able to be ready in 30 days, might be, if he were to devote all his time just to this case.
>
> THE COURT: I'm sure he's going to be beholden to me for selecting him. Of course, he was taken off the alphabetical list, I haven't met the gentleman before I talked to him on the phone . . . (J.A. 35).

Mr. Colston then requested a minimum of 30 days.[1] The court peremptorily set the trial date for July 14, twenty-five calendar days hence (J.A. 35).

The judge then suggested "a dismissal or plea bargain or something" and was informed that there had been discussions with Levine about a bargain for Cummings (J.A. 36).

Colston then asked if he could file motions and hire an investigator. The court replied that he could not file "regular motions, motions to suppress or that sort of thing" but he could file

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[1] He also filed a written motion for continuance (Record, V. 1, p. 20).

a motion for an investigator (J.A. 37). Colston said his "most pressing assistance needed right now would be of an accountant" since the Government had employed two accountants. The court indicated it would grant such a motion but "$300.00 is the most we can pay" (J.A. 37). The court also said it would approve a motion for appointment of an investigator (J.A. 38).

Respondent then stated that Colston had just told him his "specialty is real estate law, he's only tried — has been involved with one federal criminal case in his entire legal experience. . . ." (J.A. 38).

The judge interrupted:

> If you're getting around to saying you want to select your own lawyer, no way. You have got a good lawyer and if you want your own, go hire your own. This man was appointed under our system. We select qualified lawyers. He's qualified or I wouldn't have appointed him . . . (J.A. 38).

From June 19, 1980, the day of his appointment, until the trial, 25 days later, Colston filed no motions, not even for appointment of an accountant or an investigator.[2] Nor did Colston renew respondent's objection to Levine's representation of Cummings, despite her guilty plea and role as the government's chief witness. Colston did obtain subpoenas for six witnesses (J.A. 4) but called no witnesses at trial (J.A. 94).[3]

The Trial

At the outset of the trial, which began on July 14, the court explained the theory of the indictment to the jury pool, stating that defendants Cummings, Merritt and respondent had devised a scheme to defraud, known "in banking circles as a kiting scheme" (T. 6). The essence of it was the depositing of checks,

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[2] He did not agree to reciprocal discovery until June 24th. Memorandum of Reciprocal Discovery, Record, Vol. 1, p. 203.

[3] It is not clear how many witnesses were actually served or appeared (J.A. 94).

"a fraudulent check . . . when really there is no money there, just a bank balance showing that there was money" (T. 7), and the mails were used in the bank's clearing process (T. 8).

Mr. Colston introduced to the court one Ryland Rivas "who will be assisting the defense in this case" (T. 2). The record does not disclose whether Rivas attended regularly nor does it record any participation by him other than a nine word statement on the third day of trial (T. 463).

Mr. Colston apologized to the jury for reading his opening statement, explaining "this is my first trial" (J.A. 44). The defense outlined in his opening statement was that respondent had more than sufficient funds to cover all the overdrafts but did not do so because "he wasn't involved" (J.A. 41). He had no control over Skyproof, its bank accounts, or its checks (J.A. 41). Colston also implied that no one was misled; the bank chose to honor overdrafts in its own, informed self-interest (J.A. 41).

The government presented its case through eighteen witnesses over four days. Approximately sixty exhibits were entered into evidence, consisting mainly of dozens of checks, bank statements of four bank accounts covering periods of three to six months, records of mailing, and charts tracing flows of funds through the various bank accounts.

The government's evidence showed that in 1973, respondent's father founded Skyproof Manufacturing Company in Tampa, Florida. It fabricated trusses, or roof supports, for mobile homes. Initially, there were only two or three employees and one small building (T. 509).

Respondent took over the operation in July, 1974. The business grew under respondent's control and eventually three buildings were used and 18 to 20 employees worked (J.A. 75). The payroll was about $10,000 per month (T. 242). There were lengthy back orders (T. 349) and at one point, in October, 1975, it was necessary to work three shifts (T. 504). No records of Skyproof's assets, sales, expenses, or income were offered but one witness guessed that sales were $30,000 per month (J.A. 75); another, that they were $150,000 in 1975 (T. 483).

There were cash flow problems, however. Twenty thousand dollars was borrowed from a bank (T. 506). Another $15,000 was borrowed from a lumber supplier (T. 506), who testified that Skyproof often could buy all the lumber he could supply (T. 313).

When respondent took over the operation of Skyproof, he brought defendant Cummings in to help with secretarial work (T. 473). He also made her president and sole shareholder, explaining to Cummings that this was necessary because a previous business of his had gone bankrupt and he had received bad publicity. There was also an I.R.S. lien. As a consequence, respondent couldn't have anything in his own name (T. 475).

Although president and sole shareholder, and holding herself out to be such (T. 506), Cummings testified that respondent was in complete control and that she did only what he told her to do (J.A. 83). Whenever he gave her papers to sign, she did so, rarely reading them or asking questions (J.A. 83). She regarded herself as president "legally but not morally" (J.A. 85).

In the spring of 1975, respondent contacted co-defendant Wylie Merritt, who testified under an agreement that the charges would be dismissed against him (J.A. 78), at Merritt's CPA office in Norman, Oklahoma (T. 365). Merritt had done accounting work for respondent since 1969 (T. 362). Respondent asked Merritt to help him secure financing for Skyproof (T. 362). Merritt was unable to find any financing, but agreed to help in a small way by "factoring" — advancing his personal funds against factory orders and being repaid, with interest, when the orders were filled and paid for (T. 370). Under this arrangement, Merritt wrote checks to Skyproof on his account at the First National Bank of Norman and sent them to Tampa (T. 375). He would then receive a check from Skyproof (signed by Cummings) and Cummings or respondent would call him and tell him when to deposit it (T. 374). Later, in June, he signed blank checks and sent them to Tampa and received reimbursing checks, also signed in blank. The amounts became

larger (T. 383). Merritt decided he wanted to discontinue the factoring because he had other needs for his money. The arrangement was terminated in late June, 1975 (T. 385).

In the course of Merritt's factoring, some checks were lost and, as a result, there were some overdrafts in his account at First National (T. 413). Because of the overdrafts, Merritt had to borrow $3,250 (T. 381). Ultimately, he was repaid and earned about $1,300 for his factoring (T. 409). Merritt was aware of no "kiting scheme" or scheme to defraud (J.A. 79-80, T. 422-3).

In June, 1975, respondent informed Merritt that his business was expanding and its books were in bad shape (T. 372, 414). He asked Merritt to take over the bookkeeping (T. 372). Merritt opened an account for Skyproof at the Norman Bank of Commerce, a relatively new bank and a client of Merritt's (T. 372, 379).

From late June through September, although no longer using his own funds to help finance Skyproof, Merritt, on an almost daily basis, filled in the amounts on checks drawn on Skyproof's Tampa account and deposited them in the Norman bank account. Approximately once a week, Cummings sent him signed checks with the amounts blank. She called Merritt every day or so to tell him the amounts to fill in (T. 396, 407).

Respondent, when in Tampa, kept a record of the checks in a notebook and told Cummings to call the Tampa bank for a balance almost daily (T. 495). Respondent thus determined that checks deposited in Norman took three or four days to arrive at the Tampa bank (T. 496). Respondent then determined how much was needed in deposits every day, advised Cummings, and she would telephone Merritt with the amounts to deposit (T. 496).

In August, respondent asked Merritt to examine another truss company for possible purchase. He did so but recommended instead the purchase of a bottling plant in Paris, Texas (T. 387). In September, respondent agreed to buy the plant (T.

318). Cummings signed the papers (T. 529). The bottling plant, known as Paris Processing, became a wholly owned subsidiary of Skyproof (T. 529).

From late August to late October, respondent spent most of his time in Paris, Texas refurbishing and renovating the plant (T. 354, 522).

At the time of the purchase, respondent asked Merritt to consolidate the bookkeeping for both businesses in Norman, and to rent an office there for Skyproof.[4] Merritt rented a small office in his building, equipped it, and hired Barbara Holmes to run it (T. 325). Holmes, who worked for Skyproof from September 4 to October 17, 1975, furnished the office and answered the telephone (T. 325). She did little else during her brief employment other than to fill in blank checks and make daily deposits, as Merritt had done before her (T. 328).

When the floating of checks between Norman and Tampa began, in June 1975, respondent explained to Cummings that "all companies do this. It is floating, but it gives you an inflated balance and after a couple of months of this you can go to the bank . . . and you have figures that look terrific. And he said this lends credibility to a business and gives us borrowing power" (J.A. 83).

Neither respondent nor Cummings drew a salary from Skyproof or Paris Processing (J.A. 84). About $9,000 or $10,000 of the Cummings' personal expenses were paid by Skyproof (T. 497). There were about $241,000 in checks paid to H.P. Cronic or Cronic Incorporated (J.A. 93), but deposits of $278,770.34 from the same source (J.A. 92), for a net deposit by respondent of $37,770.

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[4] According to Cummings, there was "no bookkeeping" at this time (T. 493, 523). Respondent, however, had his notebook on which records of a sort were kept (T. 496), Cummings reconciled the bank statements (T. 518), and she and another woman did the billing work (T. 540). Merritt never actually got his bookkeeping underway before more pressing problems relating to the bounced checks arose (T. 492).

Cummings was not very concerned about the "floating" until respondent told her to write another $200,000 in checks to cover the purchase of Paris Processing (J.A. 84). She didn't believe there was enough money to cover that (T.492), but when she questioned large checks respondent asked her to write, he told her to call the bank and get the balance. She would call and they would "say there's $350,000" (J.A. 84). She "really had no idea what kind of money there was or wasn't" (J.A. 84).

In early October, 1975, an employee of the Tampa bank showed the Skyproof account to a bank officer and asked if it was a "kiting scheme" (J.A. 59). His "immediate opinion was that it definitely was" and he began returning unpaid Skyproof checks drawn on the Tampa bank and deposited in the Norman bank (J.A. 59). As a result, the Tampa Bank account ended up with a surplus of collected funds of approximately $500,000 (T. 239-240).

When Skyproof checks drawn on the Tampa bank and deposited in Norman began bouncing in early October, 1975, the Norman bank officials decided they were victims of a "large kite" (T. 434), there being an apparent overdraft of nearly a million dollars (T. 169).

They contacted Wylie Merritt. He assured them it was merely a bookkeeping error and there was no cause for concern (T. 289). He told them that respondent was in control of Skyproof and arranged a meeting in Dallas with respondent, himself, the Norman bank president, and the bank's attorney. At the meeting, on October 12, respondent suggested that perhaps some checks between the two banks had been lost or there had been a bookkeeping error (T. 435). He assured them that he had more than enough assets to take care of any overdraft and would make it good no matter what (T. 172). He also handed them a letter signed by Cummings for Skyproof, dated October 10 (T. 237), authorizing the Tampa bank to transfer all available funds to the Norman bank (T. 220). A collected balance of approximately $500,000 was shortly transferred to the Norman bank pursuant to that letter.

Skyproof promptly hired a Tampa CPA, who analyzed the accounts and determined that there was an overdraft of about $484,000 (T. 300). Skyproof turned over the analysis to the Norman Bank (T. 183, 281). From June through October, 1975, $4,841,000 in checks or bank transfers drawn on Skyproof's Tampa account had been deposited in the Norman Bank (J.A. 93). From April through October, 1975, $4,140,069.14 had been deposited in the Tampa account (J.A. 92). Of these total deposits, $9,981,069.14, all but about $450,000 were cleared. Thus, the net overdraft was about 4.5% of the deposits.

Cummings, as president and sole shareholder of Skyproof, signed a note to the Norman bank on November 24, 1975 (T. 507-508) for about $484,000, plus interest, secured by a mortgage on Paris Processing Co., Skyproof Manufacturing Co., and various items of equipment and personal belongings (J.A. 51). According to the bank's attorney, the mortgage gave the bank "everything from soup to nuts" (J.A. 56).

Although the first payment on the note was not due until June 1, 1976 (J.A. 57), the bank replaced the directors of Paris Processing less than two weeks after the note was executed (T. 202) and began operating the plant as its own in December, 1975 (J.A. 52).

The Norman bank operated the bottling plant from December, 1975 to January, 1978. There was never any accounting of the profits made by the bank during this period (T. 215).[5] Bank examiners ultimately forced the bank to get rid of the plant. The mortgage was foreclosed with the bank buying the plant on January 3, 1978, for the full amount of the note and judgment, $504,000 (J.A. 113-115). On the same day, the bank sold the plant to two of its directors, who formed a corporation for the purpose, for $504,000 (T. 217). This covered the note, interest, costs of foreclosure and attorney's fees (J.A. 113). The bottling plant was still operating at the time of trial, managed by the same person whom respondent had hired to

[5] Defense counsel did not subpoena the records of Paris Processing to determine how much the profits were.

manage it in 1975 (J.A. 74-75). It had twenty employees (J.A. 75).

Despite the fact that the exhibits in the case clearly proved that the Norman bank had not lost a penny (J.A. 109) — indeed that it had received interest, attorneys' fees, and legal costs, in addition to the overdraft (and the profits from two years' operation) — bank officials testified without challenge that the bank nearly collapsed as a result of the "kiting scheme" (T. 467, 174). The bank's attorney — after testifying that respondent had told him in Dallas, that "whatever happened, they would find out and certainly make it good" (J.A. 49) — when asked by the prosecutor, "Did he ever make good to this day?" responded, "No, sir" (J.A. 49). The attorney testified that his bank lost "approximately half a million dollars" (J.A. 50). Later, he volunteered that "a total of $9,000.00 may have been paid" on the overdraft (J.A. 52). The bank president also swore that "nothing has been paid" on the overdraft (T. 438).

Various bank witnesses testified that overdrafts are common (T. 260, 295). When overdrafts are honored, or immediate credit is granted on uncollected funds, which is also common (T. 104), this is an informal extension of credit for which the bank may but need not levy a charge (T. 294, 457). They also testified that a bank's lending power is determined by its total of collected deposits (J.A. 66, T. 443). Thus, floating checks between two banks, essentially reversing deposits and withdrawals, would increase the lending power of both banks.

A postal inspector testified that he had begun his investigation on October 10, 1975, on complaint of the Norman Bank, and had taken it to the United States Attorney eleven months later. He had been "living with the case five years" (T. 552). He opined that it took nearly five years to bring the indictment because the United States Attorney's Office was understaffed (T. 553).

The grand jury had heard a different explanation for the delay. In its brief in the court below, the government quoted

from a colloquy between Mr. Green (the trial prosecutor) and a grand juror:

> GRAND JUROR: Why did this take five years to — why did this take five years to put this together?
>
> MR. GREEN: . . . you have got lots of transactions. You have hundreds of checks . . . . We had just literally — there will be thousands of documents that is going to be involved in putting all of this together to show the various transactions . . . (Appellee's Brief below, p. 14)

At the end of the government's case, Mr. Colston told the court that he did not plan to call any witnesses (J.A. 94). The court then explained defendant's right to testify and found that right waived (J.A. 96). The court also noted that several witnesses had been subpoenaed at government expense, and "the witnesses were here, you just decided not to put them on?" Colston answered yes (J.A. 97).

The court also told respondent that, "This young man, Colston, I think, has done a tremendous job representing you." Respondent agreed (J.A. 94). Later, the court said it wanted to "make a record" that respondent "expressed his personal appreciation of these lawyers for the work they have done." Respondent agreed with that too (J.A. 97).

Mr. Colston made only ten objections during the trial (T. 100, 190, 194, 247, 249, 348, 376, 377, 378, 436). In none of them did he disclose the reasons for the objections. There is no reference by the defense during the entire trial to the rule against leading questions, the rule against opinions or opinions on ultimate facts, the rule against hearsay, or *any* rule of evidence. All of these rules were violated repeatedly and without objection by most of the government's witnesses (J.A. 51-52, 58, 62; T. 169-170, 183, 223-24, 403, 432, 467, 481, 516, 552, 553). No fewer than three witnesses, for example, testified, without objection, that in their opinion the banking transactions in issue constituted a "check-kiting" scheme (T. 103-104, 235, 250-54, 432, 467, 554, 557, 559).

Although a number of documents were made available to the defense prior to and during trial, the record does not suggest that defense counsel requested or received any statements of government witnesses pursuant to 18 U.S.C. § 3500. There is no reference, in cross-examination or elsewhere in the record, to any such statements or to any grand jury testimony of any of the government witnesses.

In his brief cross-examination of the Government's witnesses, Colston sought admissions that respondent was not a decision-maker or in control of any of the transactions (E.g., J.A. 53-56, 59-62, 64, 68, 72, 73, 77, 80, 85-86, 88-91). He repeatedly emphasized that Cummings, not Cronic, had signed all papers and all checks and was the president and sole shareholder of Skyproof, and that Paris Processing was a subsidiary of Skyproof. The evidence that respondent was in control and made all arrangements and decisions concerning the writing of checks, however, was overwhelming. Not only had the two codefendants so testified, but the Norman bank President, the bank's lawyer, and three other witnesses testified that respondent acted as the true owner of Skyproof in negotiations with them (J.A. 49, 69, 72, 73; T. 186, 301, 340, 342, 373, 435). Three witnesses also testified that respondent had told them that he was the true owner of Skyproof (T. 342, 373, 475).

In his summation, which took less than ten record pages, Colston continued with this "defense," urging that legal control was in Cummings and that she was the responsible decision-maker (J.A. 100-102). Colston also argued that respondent had no intent to defraud *because* "he didn't have anything to do with it" (J.A. 100). Colston also urged that the first three counts of the indictment were false. They alleged that Merritt's factoring arrangement was part of the scheme and Merritt, the government's own witness, had testified otherwise. "If you're not guilty of one, you're not guilty of any of them" (J.A. 102).

The defense submitted no requests to charge the jury and stated that the charge as given was "just fine" (T. 599).

The jury acquitted respondent on counts two and three. It rejected Colston's logic, however, and convicted respondent on the other eleven counts (T. 601).

Post-Trial Proceedings

Judge Eubanks sentenced respondent to twenty-five years in prison and an $11,000 fine but indicated that if respondent would reimburse the bank its losses, and pay his court-appointed attorney, costs and a fine, probation would be granted (J.A. 107-108). Respondent agreed, provided he could have access to the bank's books to verify the loss. The bank refused (J.A. 106).[6]

About six months after trial, respondent moved to vacate the conviction, alleging newly discovered evidence. He claimed, *inter alia*, that evidence of the foreclosure and the sale of Paris to its directors proved conclusively that the bank suffered no loss and that its two officials had committed perjury in testifying otherwise. He also claimed that the government knew or should have known of such perjury, that reasonable investigation by his counsel would have disclosed that, and that effective representation would have resulted in proof that no loss occurred.[7]

Respondent swore in his post-trial motion that he only had one "substantive meeting" with his counsel "prior to or during the trial." This occurred the day before the trial began (J.A. 122). He also swore that he was at all times displeased with his court-appointed attorney and in fact had consulted a psychologist prior to trial about how to deal with his attorney's in-

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[6] Respondent had some rich aunts that were willing to bail him out (J.A. 108).

[7] He made a similar claim about the testimony of the bank officials that the bank nearly collapsed and was almost closed down by the bank examiners because of insufficient capital, brought on by the huge loss they claimed respondent inflicted on the bank. Respondent submitted reports by the same bank officials which indicated that the bank's financial position *improved* during this period.

experience and his hostile attitude. The psychologist had advised him to try to bolster Colston's confidence by praising him in public. Respondent took that advice. A letter from the psychologist was included in the motion papers to substantiate the claim (J.A. 119). The district court declined to consider the motion pending appeal.

Appeal

On appeal, with new court-appointed counsel, respondent complained, *inter alia*, of the district court's failure to disqualify his former attorney, Levine, from representing codefendant Cummings, the failure to grant more time for trial preparation, and ineffective assistance of counsel in both the trial and sentencing phases. The complaint about ineffective representation at sentencing was based largely upon counsel's failure to contest (indeed, willingness to stipulate to) the bank's claim that it had suffered a loss of $350,000. Respondent pointed out, *inter alia*, that the bank had made a *profit* and that defense counsel should have known that.[7a]

The Tenth Circuit, finding no evidence that attorney Levine had obtained any "damaging" confidential communications from respondent, rejected the first claim (Pet. App. 62). On the issue of effective assistance, the court noted that court-appointed counsel was a specialist in real estate law and inexperienced in criminal defense. The government's investigation had yielded "literally thousands of documents, including hundreds of checks" and counsel was given only twenty-five calendar days in which to prepare (Pet. App. 2a). The court then applied a test, earlier applied in its *King* and *Golub* decisions, for inferring "inadequacy of representation without proof of *specific* prejudice at trial" (emph. supp.). According to

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[7a] Respondent also complained that he was sentenced on erroneous information — that the bank had suffered a loss (ranging, in various testimonial assertions, from $484,000 to $419,000 but coming to rest at $350,000 during sentencing) when the incontrovertible proof was otherwise. The court of appeals did not reach this issue (Pet. 2a-2b).

those decisions, prejudice may be "inferred" when "circumstances hamper a given lawyer's preparation of a defendant's case" (Pet. App. 3a). Such circumstances, relevant in the present case, the court said, include:

> (1) the time afforded for investigation and preparation; (2) the experience of counsel; (3) the gravity of the charge; (4) the complexity of possible defenses; and (5) the accessibility of witnesses to counsel (Pet. 4a).

After comparing the circumstances here to the facts in *King*, the court concluded:

> We do not hold that an attorney's lack of relevant experience inevitably leads to ineffective assistance of counsel. We simply hold that on the facts of this case, applying the criteria set down in *King* and *Golub*, Cronic cannot be said to have been adequately represented (Pet. 5a).

In its petition for rehearing, the government attached an affidavit of Ryland Rivas, prepared for that purpose (dated May 20, 1982). Rivas stated that he had been admitted to practice in 1974 and had "tried jury cases ranging from escape from the penitentiary to murder in the first degree," but made no reference to experience in federal cases or business crimes. The affidavit states that Rivas "assisted Mr. Chris Colston in his preparation of defense for Mr. Harrison Cronic," but does not say how or how much. It also states that Rivas "was present during all stages of the proceedings to assist Mr. Colston with the preparation and drafting of motions, examination of witnesses and examination of all evidence available to Mr. Colston" (Pet. Br. App. A).

In his reply to the petition for rehearing, respondent objected to the affidavit as outside the record. He also disputed it. The record refutes the implications of the affidavit, if not its literal terms. Rivas may have been "present," but he did not assist in any motions, because no motion was filed. Nor did he participate in the examination of witnesses or in anything that appeared in the record. The record establishes that if he was present, it was as little more than a spectator.

The Court of Appeals denied the petition for rehearing without opinion.

SUMMARY OF ARGUMENT

The constitutional right to effective assistance of counsel emanates from two distinct sources: the Due Process Clause and the Sixth Amendment. Under the Due Process Clause, the Court has developed, largely since *Powell* v. *Alabama*, 287 U.S. 45, 71 (1932), standards regarding the right, inherent in due process, "to defend with counsel," see *Ungar* v. *Sarafite*, 376 U.S. 575, 589 (1964). Judicial impairments of the defense which unfairly undermine a defendant's right "to defend with counsel" are violations of the Due Process Clause. The main focus is not on the defense lawyer but on the opportunity the court affords an accused to prepare and present a defense. The competence of the defense attorney has a bearing upon the assessment of the fairness of the opportunity to defend, but only as part of the larger question.

Whether a defense attorney exercised the requisite degree of skill, judgment, diligence, zeal and loyalty is a question of constitutional dimension in itself, emanating primarily from the Sixth Amendment right to assistance of counsel. Where there otherwise is a fair opportunity to "defend with counsel," the focus shifts from fundamental fairness and the larger inquiry posed by *Powell* and its descendants to the narrower question of whether the failings of the particular defense lawyer denied the accused effective assistance in the Sixth Amendment sense.

Both the due process right to fundamental fairness and the Sixth Amendment right to competent counsel are potentially involved in the present case. The decision of the court below, however, was plainly predicated upon fundamental unfairness. Petitioner is wrong in assuming that the only issue here is the competence of counsel in the narrow Sixth Amendment sense.

I

Taking the due process perspective first, the question before the Tenth Circuit was whether, under all the circumstances, the defendant had a fair opportunity "to defend with counsel." If he did not, his conviction is invalid without regard to prejudice. This is because the *court* failed to permit that fair opportunity.

Cases requiring *per se* reversal, such as *Powell*, *Glasser*, *Geders*, and *Holloway*, are not distinguished from this one by the concept of "external restraint." The trial court's appointment of an inexperienced lawyer over the defendant's objection is as much "external restraint" as was involved in those cases. When, moreover, the court allows only 25 days for that inexperienced counsel to prepare, that is an "external restraint" too. These are court-imposed restrictions, not conditions inhering in the mental operations of the defense lawyer.

To require identification of a specific failure of counsel, and prejudice therefrom, would overrule *Powell*, and would miss the point. Where a fair opportunity to prepare and present a defense is absent because of a court's rulings, no fair trial has occurred. A search for specific failings of counsel in such a case would shift the blame from the court to the lawyer and would be virtually irrelevant. A failure to find specific derelictions by counsel would only beg the fundamental fairness question.

The court below was plainly correct in holding that, under all the circumstances, respondent did not have effective assistance of counsel in the sense in which those terms are used in *Powell*. The trial court was clearly informed, in an objection made by respondent, that the attorney it was about to appoint was a real estate lawyer who had never tried a case, much less a criminal case. Instead of inquiring into the attorney's capacity to represent the accused or the time he might need to acquire that capacity, the court lectured respondent that he could not choose his own attorney. In a case in which the government took some 1800 days to prepare—with the help of postal inspectors, grand juries, accountants and auditors—the court

then gave the defense only 25 calendar days (including the 4th of July holiday), without motions or substantial assistance to prepare its case.

Even if it is appropriate to require an inference that the actual preparation and presentation of the defense was substantially affected, that inquiry cannot ignore the complexity of the case, the time to prepare, the inexperience of counsel. It makes no sense to consider each of these matters in isolation, as if each was the only problem with the trial. Plainly, each of these factors adds weight to the others. The appropriate question is whether all of them, in combination, produce an inference of unfair impairment of the defense.

Where the defense has been unfairly impaired by court rulings, as here, this Court's decisions require reversal. As in conflict of interest cases, the impairments preclude counsel from doing many things that might otherwise be done. It is impossible to reconstruct, much less to evaluate, what those things were. It also wastes a court's time to attempt to do so.

But if any showing of prejudice is required, it cannot be more than that of a significant possibility of a different result. Had the defendant been represented by experienced counsel, with adequate time to prepare, it is a certainty that such counsel would have recognized the only defense in this case—that the bank suffered no loss, indeed, made a hefty profit, and that there was no intent to defraud. There was far more than significant possibility that a jury, properly instructed as respondent's jury was not, and properly informed of the facts, would have acquitted respondent on all counts of the indictment.

II

If this were a case in which the right to "defend with counsel" had been respected by the trial court and in which the only plausible deprivation of constitutional rights lay in the defense lawyer's unseen motivations, unknown skills, and unknown competence, the decision of the court below would still have been correct.

Neither law nor logic requires a court, before finding ineffective assistance, even in the narrow Sixth Amendment sense, to find a specific, gross dereliction by counsel. Pervasive ignorance or ineptitude may itself sometimes satisfy any standard. As all Courts of Appeals have agreed, a series of small blunders or deficiencies may be the equivalent of one or more gross derelictions. Moreover, a court is entitled to infer from demonstrated inadequacies which the record reflects that there were others which the record does not clearly reflect. Such inferences would be particularly appropriate where the demonstrated deficiencies were perpetrated by a wholly inexperienced lawyer trying a complex case with only twenty-five days to prepare.

Pervasive, serious incompetence is inherently prejudicial, as it demonstrates that the defendant did not have a fair trial. Although a court, before concluding that there was pervasive incompetence, should consider the probabilities that the deficiencies substantially affected the presentation of the defense and thus involved a gross departure from the relevant norms of competency, no additional inquiry need or should be made into "prejudice." Such a question would be redundant unless actual effect on outcome is the meaning of "prejudice." To require the accused to demonstrate his probable innocence in order to obtain relief on direct appeal from the results of a trial permeated with incompetence would be a grave, unprecedented, and shocking departure from fundamental constitutional concepts.

An examination of the record demonstrates the soundness of the analysis of the Tenth Circuit which inferred inadequate representation and prejudice from all the facts and circumstances.

There is no evidence in the record that respondent's counsel ever interviewed or even tried to interview any of the eighteen prosecution witnesses. On the contrary, it is plain that, with the possible exception of one prosecution witness, he had not previously communicated with the witnesses. No prior statements of any such witnesses to the government were requested or obtained.

Counsel pressed throughout the trial, from the opening statement (which he read) to his summation, an utterly preposterous defense: that because respondent was not the owner of Skyproof and did not write the checks, he couldn't be guilty. This is a defense that a real estate lawyer might assert in a breach of contract dispute but it shrieks ignorance of elementary principles of criminal law. Counsel apparently did not know that his client was responsible for what he directed or advised, whether or not he was the "owner" or in formal "control" of the company or the bank accounts.

Only ten objections were tendered during the entire trial by defense counsel. None of *them* referred to or reflected knowledge of any rule of evidence. Most witnesses were permitted without objection to run on in narrative form, to opine about the defendant's guilt, and to inject inadmissible hearsay. Two witnesses, the attorney for the bank and the bank president, were permitted to lie about the bank's losses without challenge. Counsel had in his hands an exhibit that itself showed that the bank had suffered no loss. He apparently did not read it or, if he did, did not understand it.

Despite the obvious complexity of the case and the acknowledged need for an expert to analyze the bank's transactions, defense counsel employed no expert and did not himself analyze the transactions. In his summation, counsel made no effort to discuss the flow of checks, the possibility of bookkeeping errors, or anything of the sort.

Counsel did not pursue the only conceivable defense, lack of fraudulent intent. Nor did he request any instructions on that issue. A number of favorable instructions would have been given had counsel requested them, e.g., that repayment is evidence of good faith and no intent to defraud, that depositing a check is not a representation there is cash on deposit to cover the check.

Counsel made the ridiculous argument that the Government has to prove all eleven counts or the defendant should be

acquitted: "If you're not guilty of one, you're not guilty of any of them."

Under any standard of effective assistance, and certainly under the proper standard, respondent was denied effective assistance of counsel in violation of the Sixth Amendment.

III

Respondent does not understand petitioner to claim that the record fails to show ineffective assistance of counsel. Petitioner's position, therefore, is a complaint about the writing of appellate opinions. The court below "on the facts of this case" inferred that there was ineffective assistance. That conclusion was overwhelmingly supported by the record. It is not and should not be the law that a Court of Appeals may not grant relief unless it first details the basis of its conclusions or, here, the specific failings of counsel which it thought fell below the range of competence demanded of a criminal defense attorney. Courts can and frequently do grant relief without writing any opinion at all. Surely they cannot properly be reversed for not writing a longer opinion than they wrote.

If this Court disagrees with respondent, however, it should remand to the Court of Appeals to permit that court to provide the necessary explication. That court should also be given the opportunity to consider whether, if its judgment is not required by the Constitution, it is warranted under the supervisory power or the Speedy Trial Act which, according to a recent decision of the Ninth Circuit, would itself have required reversal here.

ARGUMENT

I

THE TRIAL COURT PREVENTED ADEQUATE PREPARATION AND PRESENTATION OF THE DEFENSE. THUS, THE COURT BELOW CORRECTLY HELD THAT RESPONDENT WAS NOT "ADEQUATELY REPRESENTED." ITS DECISION IS SUPPORTED BY BOTH THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT AND THE RIGHT TO COUNSEL CLAUSE OF THE SIXTH AMENDMENT.

This Court long has held that where appointed counsel is required, the Due Process clause of the Fifth Amendment is satisfied only by "effective appointment of counsel." *Powell* v. *Alabama*, 287 U.S. 45, 71 (1932). This requires, at a minimum, that counsel not only be present at every critical stage of the proceedings, but that the appointment be made early enough in the proceedings to permit adequate preparation. *Powell* v. *Alabama*, *supra* at 57-59. This is the right to "effective aid in the preparation and trial of the case," *id.*, at 71, and is part of a larger right to defend against the charges, the most basic element of due process.[8]

Since the issue is fundamental fairness, there is no *per se* rule against which tardiness in the appointment of counsel, see *Chambers* v. *Maroney*, 399 U.S. 42, 54 (1970), or refusal to permit a continuance, see *Morris* v. *Slappy*, ___ U.S. ___, 103 S. Ct. 1610, 1616 (1983), can easily be measured. The courts may balance against this right the public's interest in the orderly administration of justice. *Morris* v. *Slappy*, *supra*.

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[8] See also, *Avery* v. *Alabama*, 308 U.S. 444, 446 (1940), *White* v. *Ragen*, 324 U.S. 760, 764 (1945); *Hawk* v. *Olson*, 326 U.S. 271, 276 (1945).

A. *In determining how much time is needed for adequate preparation, the trial court must consider the seriousness and complexity of the case and the experience and ability of the counsel it appoints.*

In weighing the public interest in expeditious trials against the defendant's right to prepare a defense, this Court and others have considered the following factors:

1. *The seriousness of the charge.* From *Powell* v. *Alabama*, *supra*, through *Hamilton* v. *Alabama*, 368 U.S. 52 (1961), *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), *Argersinger* v. *Hamlin*, 407 U.S. 25 (1972), and *Scott* v. *Illinois*, 440 U.S. 367 (1979), this Court has recognized that the seriousness of the charge will affect the scope of the "right to defend with counsel." The Courts of Appeals have repeatedly, and apparently unanimously, agreed that in determining whether adequate preparation time has been afforded, the seriousness of the charge is an important consideration. See, e.g., *Rastrom* v. *Robbins*, 440 F.2d 1251 (1st Cir.) cert. denied, 404 U.S. 863 (1971); *Moore* v. *United States*, 432 F.2d 730 (3d Cir. 1970); *Wolfs* v. *Britton*, 509 F.2d 304 (8th Cir. 1975); *Townsend* v. *Bowmar*, 351 F.2d 499 (6th Cir. 1965).

The most significant gauge of the seriousness of the charge is the maximum penalty the accused faces. *Harris* v. *Housewright*, 697 F.2d 202 (8th Cir. 1982). A subsidiary, hindsight test of seriousness is the imprisonment actually imposed. *Wolfs* v. *Britton*, *supra*.[9]

2. *The complexity of the case.* Both in determining whether counsel is required at all[10] and in determining adequate preparation time, the factual and legal complexity of the case is often of equal significance to the seriousness of the

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[9] See generally, Duke, *The Right to Appointed Counsel: Argersinger and Beyond*, 12 Amer. Cr. L. Rev. 601, 609-612 (1975).

[10] See *Argersinger* v. *Hamlin*, 407 U.S. 25, 47 (1972) (Powell, J., concurring); *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973).

charges. *United States ex rel Spencer* v. *Warden, Pontiac Corr. Ctr.*, 545 F.2d 21, 23 (7th Cir. 1976).

3. *Other burdens or hindrances to trial preparation.* When witnesses are scattered, their locations unknown or they are numerous, adequate preparation time will be correspondingly enlarged. *Wolfs* v. *Britton, supra; United States* v. *Rothman*, 567 F.2d 744 (7th Cir. 1977).[11]

4. *The experience of counsel.* Experience of counsel in the preparation and trial of criminal cases corresponds to preparation time. Experienced counsel will know how to contact witnesses, how to interrogate them, how and where to find documents, how to obtain subpoenas and have them served, where to find relevant experts. Moreover, an understanding of the relevant procedural and substantive law will not only guide counsel in his or her search for evidence but will also help determine the admissibility and relative importance of potential evidence. The trial of a criminal case is a complex, technical, rule-bound undertaking. A lawyer who is not intimately familiar with that law and practice—even if he or she is a skilled investigator—will not know where to begin an investigation, much less how to complete it.

A lawyer who is inexperienced in the trial of criminal charges and has a limited time in which to prepare must make an unguided choice between learning the law and procedures applicable to the case and investigating the facts.

Only a lawyer who is experienced in a specialized form of criminal practice, of which the charges are a part, can employ most of his or her efforts in factual preparation. Federal mail fraud law is an arcane mystery to those who are not familiar with it. The language of the statute provides little more than a clue to the elements of the offense. See, e.g., *United States* v.

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[11] Several courts also consider, as a rough gauge of complexity and other burdens of preparation, the amount of time it took the prosecution to bring its indictment. See *Townsend* v. *Bomar, supra; United States ex rel Spencer* v. *Warden, supra; United States* v. *Golub*, 694 F.2d 207, 215 (10th Cir. 1982).

Margiotta, 688 F.2d 108 (2d Cir. 1982), cert denied, 103 S. Ct. 1891 (1983). There is no generally available treatise on the subject.

The impact of inexperience on the preparation and presentation of a defense is pervasive and of low visibility. As the Chief Justice observed in his Sonnett lecture, to assume that "every person admitted to the bar [is] qualified to give effective assistance [in] . . . the trial of criminal cases . . . is no more justified than [assuming] that every holder of an M.D. degree is competent to perform surgery. . . ." Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 Fordham L. Rev. 227, 231 (1973). The Chief Justice rightly observed that there "is no parallel" to "our naive assumption that every graduate of a law school is, by virtue of that fact, qualified for the ultimate confrontation in the courtroom. No other profession is as casual or heedless of reality as ours." *Id.* Seven years later, the Chief Justice adhered to these views, noting that intervening studies had supported them. Burger, *Some Further Reflections on the Problem of Adequacy of Trial Counsel*, 49 Fordham L. Rev. 1 (1980). If the assumption that a real estate lawyer is "qualified for the ultimate confrontation in the courtroom" is "naive," without "parallel," and "heedless of reality," the court below was surely correct in concluding that such inexperience, when combined with the manifold other disadvantages thrust upon the accused, was evidence of prejudice. The court should be commended for opening the door, if only a crack, to the light of reality.[12]

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[12] For other cases considering the experience of counsel as a factor in determining adequate preparation time, see *Rastrom* v. *Robbins*, *supra*; *United States ex rel Williams* v. *Twomey*, 510 F.2d 634 (7th Cir.) cert. denied. *sub nom. Sielaff* v. *Williams*, 423 U.S. 876 (1976).

B. *The trial court made adequate preparation impossible by appointing an inexperienced lawyer in a complex, serious case and then giving the counsel only twenty five days to prepare.*

The factors discussed above make it plain that no precise test can be constructed for deciding how much preparation time is constitutionally adequate. The totality of the circumstances must be weighed. Respondent here claims no right to have had appointed on his behalf a lawyer specializing in mail fraud. Nor does he claim any constitutional right to a specific minimum amount of time to prepare for trial. The two factors must be considered together. It is clear that the ability and experience of the counsel appointed affects the amount of time needed to adequately prepare. Here the trial court appointed a lawyer who it knew had never tried a case, much less a criminal case, much less a mail fraud case. He specialized in real estate law, and so could be expected to have at best only the most general acquaintance with criminal law and procedure. With those facts known to the court, it was incumbent on the court to make an independent evaluation of the time needed to prepare, in order to safeguard respondent's right to defend against the charges. The court could not expect the lawyer to know what was needed.[13]

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[13] Petitioner's argument that Colston's failure to renew his motion for a continuance is a waiver of the claim (Pet. Br. 36) is without merit. The court made it clear on June 19 that the matter was closed. There is, moreover, an affirmative duty on the part of the trial court to permit adequate preparation time. See *Townsend* v. *Bomar*, *supra*. This was *a fortiori* true where the court knew that counsel was without experience, respondent had objected to such an inexperienced attorney being appointed, counsel had asked for permission to employ an expert and an investigator yet had never made the appropriate motions, and the court had been apprised that it might take counsel 30 days just to understand the government's documentation. It was simply outrageous, under these circumstances, to appoint Colston, fix the trial date for 25 days hence, then forget about the matter.

Nor is there substance to petitioner's suggestion that everything was repaired when the court asked, at the outset of trial, if both sides were ready and Mr. Colston said "ready." Clearly, "ready" in such a context does not

Instead, the court disregarded the plain facts before it: (1) respondent faced a maximum sixty-five years in prison on a thirteen-count indictment; (2) the case had taken the government four and one-half years to develop,[14] involved thousands of documents, and eighteen witnesses from four states half a continent apart, (3) the charges involved mail fraud, a complex and arcane specialty of federal courts and criminal law.

The court below considered all the factors that the trial court failed to consider, and held that "applying the[se] criteria . . . Cronic cannot be said to have been adequately represented." (Pet. App. 5a). In so holding, the Tenth Circuit was not only consistent with its prior decisions, e.g., *United States* v. *King*, 664 F.2d 1171 (10th Cir. 1981), it was plainly in line with other circuits.[15] It is hard to believe that any court would have held otherwise.

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have the meaning petitioner assigns to it. It is a time-honored formality that means no more than "present." Even if counsel had said, "I am fully prepared," this would be entitled to little weight since counsel didn't know what is meant to be prepared. See *United States ex rel Williams* v. *Twomey*, *supra*; *United States* v. *Badwan*, 624 F.2d 1228, 1234 (4th Cir. 1980) (dissenting opinion). This case does not remotely resemble *Morris* v. *Slappy*, *supra*, where defendant's attorney, an "experienced counsel," 103 S.Ct. at 1614, repeatedly stated that he had fully investigated the case, was fully prepared, and did not need a continuance, and the court, after making factual inquiries into counsel's preparation, found that he was in fact fully prepared.

[14] See *United States* v. *Mitchell*, 354 F.2d 767, 769 (2d Cir. 1966) (where criminal act charged had occurred nine months before, it did "not lie in the Government's mouth now to urge the need for such speed that the trial could not be delayed . . .").

[15] *Rastrom* v. *Robbins*, *supra* (1st Cir.); *Moore* v. *United States*, 434 F.2d 730, 735 (3d Cir. 1970) (en banc); *Coles* v. *Peyton*, 389 F.2d 224, 226 (4th Cir.) cert. denied, 393 U.S. 849 (1968); *Garland* v. *Cox*, 472 F.2d 875 (4th Cir.). cert. denied sub nom, *Slayton* v. *Garland*, 414 U.S. 908 (1973); *MacKenna* v. *Ellis*, 280 F.2d 592, 600 (5th Cir. 1960), affd. 289 F.2d 928 (en banc); cert. denied, 368 U.S. 877 (1961); *United States* v. *Knight*, 443 F.2d 174 (6th Cir. 1971); *United States ex rel Williams* v. *Twomey*, *supra* (7th Cir.); *Wolfs* v. *Britton*, *supra* (8th Cir.).

The court below was also right in ruling that where preparation of a defense is unfairly impaired, prejudice may be inferred. "[T]here is no way an appellate court can say precisely how a given case would have been handled by a reasonably diligent and properly prepared lawyer. The prejudice from lack of preparation and experience cannot be nicely weighed." Accord, *Moore* v. *United States*, *supra*.

C. The court below was correct in holding that no specific prejudice need be shown in this case. Where the trial court has rendered adequate preparation of a defense impossible, it is inappropriate to require defendant after trial to prove specific errors or show that the outcome of the trial was affected.

This case fits a category familiar to this Court. This Court has held where an accused has been required to testify first, *Brooks* v. *Tennessee*, 406 U.S. 605 (1972), barred from making a summation, *Herring* v. *New York*, 422 U.S. 853 (1975), prevented from consulting counsel between direct and cross-examination, *Geders* v. *United States*, 425 U.S. 80 (1976), or forced to have a lawyer with a conflict of interest, *Holloway* v. *Arkansas*, 435 U.S. 475 (1978), reversal is required with no inquiry into prejudice. Nothing can cure such impairments of the Fifth and Sixth Amendment right to a fair chance to defend against the charges—a right that does not hinge on the guilt or innocence of the accused.

In *Brooks*, *Herring*, *Geders* and *Holloway*, the impairments of the right to defend went not to any ultimate issue of trial outcome, but to the fundamental issue of whether the trial was fair. While the error in each of those cases involved a single act by the trial court, the error in this case involved a combination of actions by the trial court: appointing a fledgling lawyer in a complex, serious case and then giving him 25 days to prepare for trial. These actions impaired the chance to mount an effective defense all the more severely because they affected not isolated moments of the trial—as when a defendant is prevented from talking to his lawyer before cross-examination *(Geders)*—but the entire proceeding. When the entire trial is

so infected, it is inappropriate to look for specific incidents of prejudice during the proceedings.[16] Moreover, this Court has recognized that such an inquiry would be futile:

> In the normal case where a harmless error rule is applied, the error occurs at trial and its scope is readily identifiable. Accordingly, the reviewing court can undertake with some confidence assessing the likelihood that the error materially affected the deliberations of the jury . . . but [where there are conflicting interests] the evil . . . is in what the advocate finds himself compelled to refrain from doing . . . Thus, an inquiry into a claim of harmless error here would require, unlike most cases, unguided speculation.

Holloway v. *Arkansas*, *supra*, 435 U.S. at 489-491. A lawyer who is faced with an impossible burden of trial preparation is, like the attorney with a conflict, "compelled to refrain from doing" many things, both in trial preparation and in the conduct of the trial. An appellate court is forced to engage in "unguided speculation" to attempt to determine whether a viable defense could have been presented by a better-prepared lawyer. If automatic reversal is appropriate in an improper conflict case, it is *a fortiori* appropriate when the court has unfairly and severely hampered preparation of the defense.[17]

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[16] The main difference between *Brooks*, *Herring* and *Geders* and the present case is that those cases involved impairments on the *presentation* of the defense whereas the instant case involved impairment of the preparation *and* presentation, as did *Holloway*.

[17] A conclusion that the defense was substantially impaired necessarily requires a court to infer that a defense, if it existed, could not likely have been mounted under the circumstances. Having thus concluded, a court would be engaged in a redundant exercise to look for specific proof that the defense was inadequate. In urging that only specific, gross derelictions can evidence inadequate preparation, petitioner is, in effect, arguing that only direct evidence is permissible: circumstantial evidence is forbidden. Petitioner would rightly label such a claim, if asserted by an accused, as sophomoric. See *Castaneda* v. *Partida*, 430 U.S. 482, (1977); *U.S. Postal Service* v. *Aikens*, ___ U.S. ___, 103 S.Ct. 1478 (1983).

Had the court below selected specific instances in the trial which it thought evidenced inadequate preparation, petitioner would doubtless contend, with

The *per se* rule of *Holloway* applies only where the trial court is apprised of the conflict, fails to make proper inquiry into the claims and a conflict of interest actually existed. *Cuyler* v. *Sullivan*, 446 U.S. 335, 348-49 (1980). The same analysis is appropriate in a claim of lack of fair opportunity to prepare for trial.

The defense may usually be expected, in support of a request for more time to prepare or a more experienced lawyer, to make, as here, a preliminary showing of the need for such requests.[18] The court's obligation at that point is to take the claims seriously, to balance competing interests, and to make findings. *United States* v. *Burton*, 584 F.2d 485, 492 (D.C. Cir. 1978) *cert. denied*, 439 U.S. 1045 (1978); *Brown* v. *United States*, 264 F.2d 363, 369, (D.C. Cir.) (en banc) (Burger, J. concurring in part) cert. denied, 360 U.S. 911 (1959); *Giacalone* v. *Lucas*, 445 F.2d 1238, 1240 (7th Cir. 1971), cert. denied, 405 U.S. 922 (1972).

Claims which are transparently flimsy or false can be rejected out of hand. Those with apparent substance may require merely a few minutes of on-the-record exploration of the claims

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some merit, that the court should have viewed the entire record as a whole rather than isolating specific shortcomings from their context. See *United States* v. *Gibbs*, 662 F.2d 728 (11th Cir. 1981); *Wade* v. *Franzen*, 678 F.2d 56 (7th Cir. 1982).

[18] A different case is presented where no such claims are proffered, or where counsel fails to request a continuance that is needed. If there is nothing in the record to suggest any problems, the court is normally entitled to assume that there are none, at least if the time given for preparation is within the normal range. If that assumption turns out to be false, the proper inquiry is of a narrower, Sixth Amendment variety, as discussed in part II of this brief. But see *United States ex rel Williams* v. *Twomey*, *supra*, note 15; *MacKenna* v. *Ellis*, *supra*, note 15; *Townsend* v. *Bomar*, *supra*; and Schwarzer, *Dealing With Incompetence Counsel-The Trial Judge's Role*, 93 Harv. L. Rev. 633, 651 (1980), suggesting that there is an affirmative obligation on the part of a judge to make an independent determination whether there is sufficient time to prepare, without a request for a continuance.

by the trial judge in order to establish their lack of substance. Moreover, when such an inquiry discloses that the claims of the defense have merit, the trial judge is not bound by the remedies proposed by the defense but is free to fashion his or her own. When that has been done, the trial court's decision is entitled to considerable deference. If, as here, the trial court fails to adequately inquire into the need for more time to prepare, then that is simply another factor for the reviewing court to take into account in deciding whether defendant's right to defend against the charges was violated.

In this case, several options were open to a conscientious trial court. The court was under no necessary obligation to name a different, more experienced lawyer. It was under no necessary obligation, under the Constitution, to allow more than twenty-five days to prepare. However, if it was of great importance that the trial take place promptly, a more qualified lawyer was manifestly required. *Rastrom* v. *Robbins*, *supra*. If a more qualified lawyer was not available, the court could have provided a fair chance to defend by a lengthy continuance, some direction for counsel, and periodic progress reports and conferences.[19]

D. Even if some showing of prejudice is warranted, the appropriate standard is a "harmless error" test assigning the burden to the government to show the impairments imposed by the trial court could not have prejudiced the defendant.

Even if it is appropriate in a case such as this to make an inquiry into prejudice, the government should bear the burden, under *Chapman* v. *California*, 386 U.S. 18 (1967), of proving the absence of prejudice beyond reasonable doubt. *Harris* v. *Housewright*, 697 F.2d 202 (8th Cir. 1982); *Garland* v. *Cox*, *supra*, note 15. If a defendant has made strong claims—

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[19] Much of this could have been delegated to a magistrate. See *Identifying and Remedying Ineffective Assistance of Counsel: A New Look After* United States v. Decoster, 93 Harv. L. Rev. 752, (1980).

not vaguely but specifically—that circumstances exist which prevent adequate opportunity to prepare—and the trial court in effect rules "so what," a *prima facie* case of constitutional violation has been made out. The prosecution could rebut the claim by showing that at trial counsel was in fact adequately prepared. As appears in part II, however, such a showing could not have been made here.

The court below was correct in looking to the likelihood of prejudice before the trial. But even if this Court decides that prejudice at trial must be examined, that inquiry—no matter who bears the burden of proof—must focus on how the chance to defend against the charges was impaired, not on whether the result might have differed. Thus the court must look to the conduct of the defense in light of the judicial impairments, and not on whether in the absence of such impairments the defendant might have been acquitted. Even petitioner concedes that it is enough for reversal if errors "fundamentally undermined the fairness of the proceedings" (Pet. Br. 16, 25).

But petitioner seems to claim in addition that appellate court cannot reverse a conviction upon an inference of generalized or pervasive prejudice, but must identify, *in its opinion* (see Pet. Br. 35),[20] specific prejudice, *e.g.*, motions that might have been made, questions that could have been asked. No authority is, or could be, cited for this proposition. Since appellate courts can—and often do—decide without any opinion at all, it makes no sense to require them, when they do write an opinion, to go into any specific detail.[21] Given the overloaded dockets of the Courts of Appeals, petitioner's argument would impose a heavy burden on judicial review.

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[20] Petitioner even asserts that "there was no finding by the court below that respondent was at all prejudiced by the timing of the substitution of counsel and the trial" (Pet. Br. 36). There was, of course, no such finding by the district court, but that the court of appeals so found could hardly have been plainer.

[21] During the year ending June 30, 1962, the United States Court of Appeals disposed of 23,780 cases. Of these dispositions, only 12,802—slightly more than half—were accompanied by opinions, and only 5,042—less than

In addressing claims of judicial impairment of the right to defend against criminal charges, this Court should consider three main factors in its analysis: If (1) the impairments on the defense were made known to the trial court (or were reasonably obvious), (2) the trial court declined reasonably to respond to the claims or make findings or seek responsive solutions, and (3) the circumstances strongly evidenced a substantial, unnecessary and pervasive burden on the preparation and presentation of the defense, then *per se* reversal of convictions in such cases is required under the guidance of *Holloway* and *Cuyler* v. *Sullivan*. In such cases, there is a clear failure by the court to respect the fundamental rights of the accused to a fair trial, and a high probability of prejudice. But where the third factor is absent or the probability of prejudice is slight, the prosecution should be permitted to establish harmless error under *Chapman* v. *California*, *supra*. Where none of the factors are clearly present, the defense should bear the burden of proving prejudice. Respondent's case clearly requires *per se* reversal. But even if some showing of prejudice is required, the decision of the court below was correct in reversing respondent's conviction. Actual, specific prejudice appeared on almost every page of the record.

II

THE COURT BELOW COULD CLEARLY HAVE HELD THAT RESPONDENT WAS DENIED EFFECTIVE ASSISTANCE, BY REASON OF THE PERFORMANCE OF HIS COUNSEL, IN VIOLATION OF THE SIXTH AMENDMENT.

Where the trial court is directly and substantially implicated in impairing the defendant's opportunity to defend, the first focus should be on fundamental fairness. The competence of counsel is only one of many factors to be considered in

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one-fourth—were accompanied by *signed* opinions. See Annual Report of the Director of the Administrative Office of the United States Courts (1982), p. 84. See generally, Duke, *Commentary*, Second Circuit Review, 45 Brooklyn L. Rev. 847 (1979).

determining whether the accused received due process. If the broader inquiry fails to yield the conclusion that due process was denied, however, the court must consider whether the accused received "effective assistance of counsel" as guaranteed by the Sixth Amendment.

A. *The meaning of effective assistance*

Although this Court had not determined with any precision what "effective assistance" entails, it is clear the accused in any serious criminal prosecution, see *Cuyler* v. *Sullivan*, *supra*, has a constitutional right to the loyal, zealous, competent services of an attorney acting as his representative. See *Von Moltke* v. *Gillies*, 332 U.S 708, 725-726 (1948). The open issue is the norm below which the performance of counsel will be considered "ineffective" and a deprivation of the Sixth Amendment right.

All Circuits other than the Second have long since rejected the old "farce and mockery" standard and substituted, under the *aegis* of *McMann* v. *Richardson*, 397 U.S 759 (1970), objective standards. See Appendix B to petitioner's brief. Respondent respectfully suggests that this Court should validate an objective standard that reflects the various kinds of fealty owed by counsel to his client: (1) undivided loyalty, (2) zealous, diligent advocacy, (3) skill, and (4) knowledge. Such qualities, prerequisites to an adversary system, have long been recognized by the American Bar Association as fundamental attributes of a lawyer.[22] To hold that an accused may

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[22] This Court will probably not want to take a definitive stand on the controversy that erupted in the Court of Appeals for the District of Columbia over whether the A.B.A. Standards Relating to the Defense Function are binding specifications of minimal competence, guidelines, or aspirations. See *United States* v. *Decoster*, 624 F.2d 196 (D.C. Cir.) (*en banc*), *cert. denied*, 444 U.S. 944 (1979). It is plain that such standards and codes of ethics are relevant in determining what may be expected of defense counsel (see *Jones* v. *Barnes*, ___ U.S. ___, 103 S.Ct. 3308 (1983), *Herring* v. *New York*, 422 U.S. 853, 862 (1975); *Holloway* v. *Arkansas*, 435 U.S. 475, 486 n.8 (1978)), and it should probably be left at that.

be convicted while "represented" by a lawyer who does not hold to such standards would tear at the fabric of our constitutional system.

In considering the appropriate norm, several considerations should be noted. First, while an accused may have a right to dispense with the services of an attorney for his defense, *Faretta* v. *California*, 422 U.S. 806 (1975), the exercise of such a right is equivalent to a slow plea of guilty. An accused who seriously contests the charges is usually incapable of doing so without the services of an attorney. See *Faretta* v. *California*, *supra*, at 838-840 (Burger, C.J., dissenting); *Powell* v. *Alabama*, 287 U.S. 45, 68-69 (1932); *Johnson* v. *Zerbst*, 304 U.S. 463 (1938); *Gideon* v. *Wainwright*, 372 U.S. 335, 334-345 (1963). Thus, the abstract existence of a "choice" is entitled to no weight in determining the appropriate standards of competence.

Second, this Court held that a defense attorney has broad power to forfeit his client's basic rights. See, *e.g.*, *Wainwright* v. *Sykes*, 433 U.S. 72 (1977); *Engle* v. *Isaac*, 456 U.S. 107 (1982). This Court has even held than an attorney can disregard the requests of his client to brief and argue nonfrivolous issues on appeal *Jones* v. *Barnes*, ___ U.S. ___, 103 S.Ct. 3307 (1983). Such powers are predicated upon "the superior ability of trained counsel . . ." *Id.*, at 3312, and "professional evaluation" of "[e]xperienced advocates." *Id.* It also assumes diligent, zealous, and loyal counsel. See *id.*, at 3316-3318 (Brennan, J., dissenting).[2]

An accused with retained counsel has the right to select an attorney whom he hopes has the qualities that the foregoing decisions presume. A court may not normally refuse a reasonable continuance to permit counsel of choice to defend the case. *Gandy* v. *Alabama*, 569 F.2d 1318 (5th Cir.) *cert. denied*, 374

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[2] For similar assumptions underlying the power of a lawyer to forfeit his client's rights at trial, see *Wainwright* v. *Sykes*, *supra*, 433 U.S. at 93-94 (Burger, C.J., concurring).

U.S. 863 (1978). If the accused is dissatisfied with his retained counsel, moreover, he can fire him and hire another, provided the substitution does not produce inordinate delay. *United States ex rel Spurlark* v. *Wolff*, 683 F.2d 216 (7th Cir. 1982).

An indigent accused, however, has no say in the selection of his attorney and may have another substituted only under the most compelling of circumstances. *United States* v. *Calabro*, 467 F.2d 973 (2d Cir.), *cert. denied*, 410 U.S. 926 (1972). If, on the other hand, he is lucky enough to draw an attorney in whom he *has* confidence, he, unlike the accused with retained counsel, has no cognizable interest in having that attorney rather than another represent him. *Morris* v. *Slappy*, *supra (dictum)*.

Thus, the accused must accept representation by an attorney about whom he knows little and, in the case of an indigent, who is selected for him, and such attorney can make binding forfeitures without even consulting the client. Such allocations of power between lawyer and client, if they can be justified at all, *cf. Faretta* v. *California*, 422 U.S. 806, 820-821 (1975), cannot rationally rest on anything but an assumption that the attorney—in the gravest of contexts—possesses a high level of loyalty, skill, diligence and knowledge. When the assumption is false, courts should—and must—acknowledge the truth. The facts of defense counsel incompetence cannot be covered up by slogans, shibboleths, or citations to cases. To hold to a fiction of competence would deny the American system of justice its essential claim to respect. See *Wainwright* v. *Sykes*, *supra* at 117-118 (Brennan, J., dissenting).

Third, no standard of minimal competence will have any practical meaning if the courts so shackle the procedures for asserting incompetence that no relief can be obtained. Petitioner's claim that intrusive scrutiny into the competence of defense counsel would "dampen the ardor of defense counsel" and undermine "the sense of mutual trust in criminal cases generally" (Pet. Br. 19, n. 8) is overblown. This Court recently suggested that a "meaningful relationship," including a rela-

tionship of trust and confidence between attorney and client, "is without basis in the law." *Morris* v. *Slappy*, *supra*. If such trust is worth preserving, however, and both petitioner and respondent agree that it is, it and "the ardor of defense counsel" will not be encouraged by a system which virtually precludes inquiry into the competence of counsel. On the contrary, nothing could be better calculated to encourage trust, confidence, ardorous preparation and performance than an assurance by the judicial system that all counsel are—in fact as well as in theory—held to significant standards of loyalty and effectiveness.

Fourth, the suggestion in petitioner's brief (pp. 19-20) that constitutional concepts should play no part in remedying incompetence—that reliance instead should be placed upon the law schools, bar committees, legislatures and other nonjudicial bodies to improve the quality of the defense bar—must be rejected. Nothing can be clearer than that such reliance has in the past been misplaced. Widespread defense counsel incompetence has been exposed for more than a decade by our most prominent jurists[24] and academics,[25] and there is little evidence of progress. The plain, blunt fact is that people who are accused of crime are numerical minorities and, most significantly, ethnic and economic minorities. Providing effective

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[24] Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?* 42 Fordham L. Rev. 227 (1973); Bazelon, *The Defective Assistance of Counsel*, 42 U. of Cinn. L. Rev. 1 (1973); Bazelon, *The Realities of Gideon and Argersinger*, 64 Geo. L.J. 811 (1976); Kaufman, *Does the Judge Have the Right to Qualified Counsel?* 61 ABAJ 569 (1975); Wilkey, *A Bar Examination for Federal Courts*, 61 ABAJ 1091 (1975).

[25] Waltz, *Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases*, 59 N.W.U.L. Rev. 289 (1964); Finer, *Ineffective Assistance in Counsel*, 58 Cornell L. Q. 1077 (1973); Tague, *The Attempt to Improve Criminal Defense Representation*, 15 Amer. Cr. L. Rev. 1091 (1977). See also, President's Commission on Law Enforcement and Administration of Justice: The Challenge of Crime in a Free Society, pp. 128-129, 149-153 (1967).

assistance, especially at state expense, is widely regarded as assisting criminals in crime.[26] Preserving our constitutional system is not an issue that gets votes in legislative halls. Reliance upon the good will of politicians to correct injustice to minorities will not work. That is why we have a Bill of Rights. The education, training, and resources necessary for effective assistance will be provided if *and only if* the courts require it. The only way they can require it is by giving real meaning to constitutional concepts.

Another reality that must be acknowledged, however, is that progress by adjudication must be deliberate and somewhat open-textured. Impossible standards cannot be imposed on the trial courts. Courts too must be educated; and sometimes wisdom—even judicial wisdom—comes slowly.

To describe the norm of effective assistance as "within the range of competence demanded of attorneys in criminal cases" as many circuits do, *e.g.*, *Knight* v. *Johnson*, 699 F.2d 162, 166 (4th Cir. 1983); *Ackridge* v. *Hopper*, 545 F.2d 457, 459 (5th Cir.), *cert. denied*, 431 U.S. 941 (1977), is to do more than suggest, as this Court did in *McMann* v. *Richardson*, *supra*, that *some* competence is demanded. Meaning is given to the standard by the Third Circuit, which requires "the customary skill and knowledge which normally prevails at the time and place," *Moore* v. *United States*, *supra* note 15. That standard, however, omits any reference to diligence, zeal or loyalty and suggests that the meaning of effective assistance can be determined entirely by parochial practices.[27] The Seventh Circuit has suggested that the norm may be derived from the prosecution ("shockingly inferior to what may be expected of the prosecution's representation"), *United States* v. *Weston*, Nos. 82-1545 and 82-1863 (7th Cir. 1983), slip op 5. The Sixth Circuit says that "defense counsel must perform at least as well as a

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[26] See Bazelon, *The Defective Assistance of Counsel*, *supra*, note 24, at 1-2.

[27] See Erickson, *Standards of Competency for Defense Counsel in a Criminal Case*, 17 Amer. Cr. L. Rev. 233, 241 (1979).

lawyer with ordinary training and skill in the criminal law and must conscientiously protect his client's interest," *Beasley* v. *United States*, 491 F.2d 687, 696 (6th Cir. 1974). This formulation implicitly recognizes the importance of skill, loyalty, zeal and knowledge. It also requires a comparison not with real estate lawyers but with practicing criminal lawyers. The Tenth Circuit requires the attorney to "exercise the skill, judgment and diligence of a reasonably competent defense attorney." *United States* v. *Golub*, 694 F.2d 207, 213 (10th Cir. 1982).

Respondent suggests that an amalgam of the Circuit formulations is appropriate: an attorney should exercise the zeal, diligence, skill and knowledge normally possessed by or reasonably demanded of criminal defense attorneys. This formulation focuses upon all the essential attributes of an effective assistant and requires the court to evaluate performance not only by comparison to customary practices but by reference to evolving standards. It is also sufficiently vague to permit case-by-case development.

B. *Departures from norms of competency that constitute ineffectiveness.*

1. Specific, gross derelictions are not necessarily required

Respondent has no difficulty with the contention that if specific derelictions are asserted, e.g., failure to object to inadmissible evidence, such claims must be evaluted in terms of (1) the gravity of their departure from constitutional norms of effectiveness and (2) the relationship of the departure or dereliction to relevant concepts of "prejudice." Such claims are capable of judicial resolution in approximately the same manner that other claims of trial error are evaluated.[28]

But respondent's case is not such a case. The circumstances of counsel's appointment, his inexperience, the complexity of

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[28] This is considered at length *infra*.

the case, the burdens of preparation, were such that respondent *could not* have received the level of peformance from his attorney that the Constitution requires. It was quite unnecessary for the court below to spell out how that performance departed from relevant norms because it departed at every phase of the proceedings. Only a most extraordinarily skilled, seasoned practitioner, perhaps a specialist in mail fraud and banking practices, could have adequately represented respondent *under the circumstances* facing his lawyer. Plainly, Mr. Colston could not meet those burdens. His "most serious mistake . . . may have been in accepting the appointment in the first instance." *Harris* v. *Housewright*, *supra*, 697 F.2d at 205.

Respondent, in the court below, pointed to several deficiencies of performance by his counsel. The court was entitled to infer that these deficiencies, while *perhaps* not sufficient in themselves to constitute ineffective assistance, were just the "visible tip of the iceberg."[29] A lawyer who makes those kinds of mistakes makes many others, some apparent on the record, some not apparent, especially when performing under the adverse conditions in the present case. Specific instances of incompetence may not themselves be flagrant, but they may warrant an inference that there were others of a like kind. Petitioner seeks to deny to a reviewing court the ability to use its own experience, its own reasoning powers, and its own common sense, in concluding that the overall effect of counsel's performance was inadequate.

The Tenth Circuit is far from alone in refusing to reject common sense. As the Eighth Circuit recently observed, "[n]o single error made by the petitioner's appointed counsel is of constitutional dimension. Yet, when viewed cumulatively, the multiple errors revealed in the record . . . demonstrate that counsel's total performance was below the level of professional skill customary for competent counsel similarly situated."

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[29] See *United States* v. *Decoster*, *supra*, note 22, 624 F.2d at 279-280, n. 87 (Bazelon, J., dissenting). See also *Garland* v. *Cox*, *supra*, note 15.

Harris v. *Housewright*, 697 F.2d 202, 206 (8th Cir. 1982). See also *United States* v. *Hammonds*, 425 F.2d 597, 604 (D.C. Cir. 1970); *Cooper* v. *Fitzharris*, 586 F.2d 1325, 1333 (9th Cir.) *(en banc), cert. denied*, 440 U.S. 974 (1978); *United States ex rel Green* v. *Rundle*, 434 F.2d 1112 (3rd Cir. 1970); *Garland* v. *Cox*, *supra*, note 15.

There is no reason why a series of small blunders or failings cannot be the equivalent of one whopper, yet petitioner argues that unless counsel commits some grievous error that itself is prejudicial, there can be no ineffective assistance (Pet. Br. 35). No court has taken this approach and this Court should not do so.

An appellate court can also consider, as one of the facts and circumstances, the manner in which counsel was appointed and supervised. In *Cuyler* v. *Sullivan*, 446 U.S. 334 (1980), this Court laid to rest the notion that only defendants with court-appointed counsel are entitled to "adequate legal assistance." But it does follow that the performance of the trial judge in selecting and supervising the appointment of defense counsel for indigents is immaterial in determining whether effective assistance was received. The court has an obligation to the indigent accused, under *Gideon* v. *Wainwright*, *supra*, that it does not owe to the accused who retains his own counsel, an obligation to *appoint* competent counsel. *Harris* v. *Housewright*, *supra*, 697 F.2d at 205. *Smotherman* v. *Beto*, 276 F. Supp. 579 (N.D. Tex. 1967).[30]

As noted above, considerations of autonomy which underly the right of an accused to counsel of his choice are absent when the accused seeks an attorney provided by the state. The notion of equal justice which informed *Cuyler* v. *Sullivan* also suggests a compensatory Sixth Amendment right of the indigent, reflecting the absence of choice in selection of counsel,

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[30] *Cf. Washington* v. *Watkins*, 655 F.2d 1346, 1355 (5th Cir.), *cert. denied*, 456 U.S. 949 (1981) (Constitution requires "counsel reasonably *likely to render* and rendering reasonably effective assistance") (emphasis supplied).

to an exercise by the court of a conscientious, informed decision to appoint competent counsel and to provide such supervision as is necessary to assure that counsel is in fact rendering effective assistance.[31]

Moreover, where, as in the present case, the defendant makes concrete objections to the qualifications of counsel, this should trigger more than a sarcastic retort. An inquiry into the claims should be made. *United States* v. *Calabro*, *supra*; *Brown* v. *Craven*, 424 F.2d 1166, 1169 (9th Cir. 1970). "[A] trial judge who appoints fledgling attorneys as defense counsel, over the defendant's protest, cannot wash his hands of their mistakes." *MacKenna* v. *Ellis*, *supra*. As this Court said in *McMann* v. *Richardson*, 397 U.S. 759, 771 (1970),

> [I]f the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel, and . . . judges should strictly maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts.

A court's conscientious efforts to select and supervise appointed counsel should weigh favorably in determining whether the performance of counsel was within the requisite norms. However, if these duties are shabbily performed and the court makes no inquiry into the experience or skill of the attorney, the seriousness of the case, or its complexity, this should weigh, along with other circumstances, in determining that counsel may have been ineffective.

Respondent is not suggesting that the way in which the trial court chooses defense lawyers or supervises their performance should ever in itself warrant a finding of ineffective assistance.

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[31] See Bazelon, *The Realities of Gideon and Argersinger*, *supra*, note 24, at 830-831; Schwarzer, *supra*, 93 Harv. L. Rev. at 641, 649-664; *The Right to Counsel and the Neophyte Attorney*, 24 Rutgers L. Rev. 378 (1970). See also, A.B.A. Standards Relating to The Function of the Trial Judge §§ 1.1, 3.4 (1972); A.B.A. Standards Relating to Providing Defense Services § 2.2 (1967).

But *cf.*, *United States* v. *Calabro*, *supra*. Regardless of the manner in which a lawyer is selected, an accused who asserts ineffective assistance must still make a preliminary showing of incompetence. But once that showing has been made, the quality of the trial judge's performance of his or her obligations becomes relevant.

In the Western District of Oklahoma, any member of the state bar and any member of any federal court bar is eligible for admission to the bar of the Western District.[22] There are no separate qualifications, as is the case in some districts. Any member of the bar is also apparently eligible, without any special training or any experience of any kind, to be placed on the roster of C.J.A. attorneys. When need for appointment arises, the attorney's name is normally selected in rotation, from an alphabetical list. Thus, there is neither requirement nor procedure for training, and no attention routinely paid to the seriousness or complexity of the case.[23] As the record in the present case suggests, no inquiry is made into the suitability of an attorney for a particular case. Such a system is virtually designed to provide ineffective assistance.

The record in the present case also suggests that no effort is made to determine if the attorney is prepared for trial or even understands what it means to be prepared. Respondent's pretrial suggestion that Colston was not experienced enough to try the case was treated with disdain and sarcasm. Only when the

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[22] Rule 4(c), Rules of the United States District Court for the Western District of Oklahoma (Eff. June 7, 1977; Eff. Sept. 1, 1982).

[23] The court's rules effective in 1977 make no reference to a selection procedure under the Criminal Justice Act. Rule 40 of the Rules Effective September 1, 1982, however, provides "Private attorneys will be appointed by the Judges of this Court. Said appointments shall be made on a rotational basis, subject to the Court's discretion to make exceptions due to the nature and complexity of the case, an attorney's experience, and geographical considerations." Thus, while the court has discretion to depart from the rotational list, the normal practice, as the record in the present case suggests, is otherwise, or at least was otherwise when respondent's counsel was appointed.

prosecution's case was completed and the defense indicated it would call no witnesses at all did the court make any inquiries. Its inquiries, moreover, were to "make a record," not to determine the facts. Coercing from the accused expressions of satisfaction shortly before his unwanted lawyer is about to make his summation is hardly the kind of supervision or honest concern that the Constitution contemplates.[33a]

If trial courts are to be as callous in their regard for the fundamental rights of the accused as was the district court, they have only themselves to blame if convictions are reversed. If, on the other hand, they make a serious effort to select qualified counsel, and to assure, during the course of the trial, that counsel is exercising the necessary competence, a record will be made that will be difficult to contest when and if an accused challenges his conviction on Sixth Amendment grounds.

[33a] Respondent's acquiescence in the trial judge's assertion that his counsel had done a good job (an opinion for which the record provides absolutely no basis) is entitled to no weight whatsoever. If an accused is incompetent to represent himself, how can he be competent to evaluate the professional performance of his lawyer? *Cf. Brennan* v. *Blankenship*, 472 F. Supp. 149 (W.D. Va.), *affd.*, 624 F.2d 1092 (4th Cir. 1980); *United States* v. *Marshall*, 488 F.2d 1169, 1192-1193 (9th Cir. 1973); *United States* v. *Unger*, 700 F.2d 63 (8th Cir. 1983); *Blackledge* v. *Allison*, 431 U.S. 63 (1977) (Defendant's denial of plea bargain not preclusive of contrary allegations in § 2255 proceeding). If respondent's remarks were sincere, they may well have been based upon his counsel's erroneous advice that the "he had nothing to do with it" defense was really a defense. In short, if the defense lawyer is grossly mistaken about the law, the client is nonetheless entitled to believe him, with the result that the client is nonetheless entitled to believe him, with the result that the client erroneously thinks he has a good lawyer. There is good reason, however, to doubt that respondent's remarks were sincere. In the first place, they were not volunteered but extracted from him, in open court, in front of his lawyer, who had respondent's life, or a sizable chunk of it, in his hands. All that respondent could expect to gain from disagreeing with the judge would be the anger of the judge *and* his attorney. See also respondent's post trial motion, where he explains that he publicly praised his lawyer's performance because he was advised to do so by a psychologist whom he consulted to try to determine what to do about his lawyer's inexperience and hostility (J.A. 119).

Given the grave deficiencies in defense lawyer training and in resources available for defense services, it is unrealistic to suggest that every accused is entitled to experienced counsel. Surely, however, the court of appeals was correct in its observation that this was not the case "for an aspiring criminal defense lawyer to cut his teeth on" (P. App. 5a).

Inexperienced lawyers can be given basic training before appearing in any case and they can get their early experience in uncomplicated misdemeanors. Later, they can "second-chair" experienced attorneys in more serious cases. Finally, they can be appointed in multi-defendant cases in which experienced attorneys are lead counsel. There is no reason for any court to do what the trial court did, and no reason to fear that affirmance of the decision below will create an untenable right to experienced counsel.

In evaluating claims of ineffective assistance, courts frequently give weight to the experience of counsel.[34] A decision that was arguably a blunder may be considered a tactical judgment if made by an experienced attorney, but not if made by a fledgling. *Wade* v. *Franzen*, *supra*. A close, more critical look will be taken. This approach, which appears to be nearly universal, is the correct one. Inexperience is never *per se* ineffective assistance but neither should absurd presumptions be employed to validate the blunders of a neophyte.

2. "Substantial" error, "gross" derelictions, "cause and prejudice"

Respondent agrees with petitioner that the departure from competency norms should be "substantial" (Pet. br. 24) in order to be defective. Whether it must also be, as petitioner

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[34] See, *e.g.*, *United States ex rel Williams* v. *Twomey*, *supra*; *Harris* v. *Housewright*, 697 F.2d 202 (8th Cir. 1982); *Crismon* v. *United States*, 510 F.2d 356, 357, n. 3 (8th Cir. 1975). *Cf. Michel* v. *Louisiana*, 350 U.S. 91 (1955); *Morris* v. *Slappy*, *supra*. Sometimes, a wealth of experience will still produce an ignoramous. See *Young* v. *Zant*, 677 F.2d 792 (11th Cir. 1982).

suggests, "gross," "flagrant," or "serious" (Pet. Br. 16, 32, 33) depends on the meaning of those terms.

A "substantial" departure could include sub-par performance without regard to effect on outcome and with little or no regard to the matter concerning which the performance was inadequate. If that is the only test of ineffectiveness, then one would have difficulty arguing that there should not also be an additional requirement for relief: a requirement of prejudice. If "prejudice" is narrowly defined to include only effect on outcomes, however, the right to effective assistance would, in many cases, be empty. Accepting such a narrow view of prejudice and casting the burden on the accused would mean that only an accused who can prove himself probably innocent would have a right to effective assistance. The obligation of the prosecution to prove guilt beyond reasonable doubt, *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975), would retain vitality only where the accused had competent counsel. This would encourage judges to appoint able counsel for defendants against whom the prosecution appeared to have a weak case and less able counsel for defendants against whom the prosecution appeared to have a strong case. The demoralizing effects of such practices on the "appearance of justice," *Offutt* v. *United States*, 348 U.S. 11, 14 (1954), as well as justice itself, can hardly be exaggerated.

Requiring the accused to bear any burden of establishing prejudice in the narrow sense of outcome-determination would also be at war not only with *Chapman* v. *California*, *supra*, but with the Court's many holdings that deprivation of the right to counsel is too fundamental to permit harmless error analyses. E.g., *Glasser* v. *United States*, 315 U.S. 60 (1942); *Holloway* v. *Arkansas*, *supra*.

If, on the other hand, defective assistance of counsel is defined as including only "gross" or "serious" departures from the norm, the legitimate interests protected by harmless error concepts can be built into the standard: a gross departure, properly defined, will exist only when the incompetence was of the *type* likely to affect outcomes or so serious or pervasive as

to make the trial fundamentally unfair or the verdict suspect. An inquiry into prejudice would be largely redundant. Defective assistance will be "inherently prejudicial" or, at most, subject to the prosecution's right, under *Chapman*, to prove harmlessness beyond reasonable doubt.[35]

What is a gross departure will depend on context. A failure to investigate a line of defense would not be gross if it was the result of an informed professional judgment that a better, inconsistent defense is available. *Cf. Fritchie* v. *McCarthy*, 664 F.2d 208, 215 (9th Cir. 1981). Failure to make a thorough extrinsic investigation may be mitigated by the fact that substantial evidence has been obtained from the prosecutors and from the defendant. Whether a failure to investigate is defective assistance should also be measured from the time the lawyer failed to investigate.[36] It is also appropriate to consider the seriousness of the stakes. A case involving the death penalty is surely entitled to more thorough preparation than a mail fraud case and the latter, especially one such as respondent's, requires more thorough preparation than a simple assault.[37]

In suggesting that the focus, in cases of pervasive incompetence or abdication of basic functions by counsel, should be on potential prejudice rather than actual prejudice in the narrow sense of outcome-determination,[38] respondent makes

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[35] The approach above closely resembles that of Judge Hufstedler in *Cooper* v. *Fitzharris*, *supra*, 586 F.2d at 1334 (concurring and dissenting opinion), and that of Judge Bazelon, in *United States* v. *Decoster*, *supra*, 624 F.2d at 264 (dissenting opinion).

[36] See *Cooper* v. *Fitzharris*, *supra*, 586 F.2d at 1220, n. 10.

[37] Respondent suggests that this is so clear as not to be debatable. This does not mean, however, that the norms or the requisite departures from them sufficient to constitute defective assistance are necesarily different in a death penalty case than in any other case. What is gross in one context, however, may not be gross in another.

[38] *Chambers* v. *Maroney*, *supra*, does not require actual prejudice in that sense. The Third Circuit, whose opinion in that case was affirmed, had a rule that belated appointment of counsel was presumptively prejudicial and required the prosecution to prove otherwise. It had held in *Chambers* that the prosecution had met its burden of showing the absence of prejudice. Judge

no novel suggestion.[38] This Court frequently reverses convictions for violations of constitutional rights without finding actual prejudice. Even in pure due process, fundamental fairness cases, reversals are commonly based not upon any inference of actual effect on outcome but upon the outcome-threatening aspects of the procedure. See, e.g., *Gardner* v. *Florida*, 430 U.S. 349 (1977); *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966); *Estes* v. *Texas*, 381 U.S. 532 (1965); *Turner* v. *Louisiana*, 379 U.S. 466 (1965); *In re Murchison*, 349 U.S. 133 (1955). As the Court noted in *Estelle* v. *Williams*, 425 U.S. U.S. 501, 504 (1976):

> The actual impact of a particular practice on the judgment of jurors cannot always be fully determined. But this

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Bazelon argued in his *Decoster* dissent that this Court, in leaving that presumption undisturbed, impliedly approved it. See 624 F.2d at 292, n. 140. In any event, commentators generally read *Chambers* as holding no more than what it says: "tardy appointment of counsel" does not require *per se* reversal. If the timing of the appointment gives rise to an inference of prejudice, however, that is another matter. See *Ineffective Representation as a Basis for Relief from Conviction: Principles for Appellate Review*, 13 Col. J. of L. & Soc. Prob. 1, 77, n. 257 (1977); *Garland* v. *Cox*, *supra*, note 15.

[38] See generally, *A Functional Analysis of the Effective Assistance of Counsel*, 80 Col. L. Rev. 1052 (1980); *Identifying and Remedying Ineffective Assistance of Criminal Defense Counsel: A New Look After* United States v. Decoster, 93 Harv. L. Rev. 752 (1980). This analysis can easily be reconciled with *United States* v. *Morrison*, 449 U.S. 361 (1981). There, after a defendant was indicted and retained counsel, DEA agents met with her, tried to get her to cooperate, and denigrated her lawyer. She refused to cooperate and informed her lawyer of what the agents had done. This Court held that dismissal of the indictment was not a proper remedy "absent demonstrable prejudice, or *substantial threat thereof*" (emph. supp.). Arguably, the conduct in *Morrison* was not a violation of the Sixth Amendment at all; merely an *attempted* violation. In any event, there was no reason to believe or even to suspect that the force of it would have continued to the trial. To have held that dismissal was proper would have raised serious questions about whether excluding a confession obtained by violation of the right to counsel is a sufficient remedy, yet of course it is. There must be some real relationship between the violation and the trial, and no opportunity to cure the effects of the violation short of reversal. There manifestly is no cure for ineffective assistance which culminates in a conviction, short of undoing it.

> Court has left no doubt that the probability of deleterious effects on fundamental rights calls for close judicial scrutiny. Courts must do the best they can to evaluate the likely effects of a particular procedure, based upon reason, principle and common experience.

When the alleged incompetence is not of the pervasive sort or does not involve abdication of basic lawyering functions, but rather relates to discrete, identified failings, such as failure to object to inadmissible evidence or failure to request a favorable charge, context both requires and permits an actual examination into what is generally, though confusingly, referred to as "specific prejudice."[40]

While failure to investigate or to prepare a defense can rarely be a tactical decision designed to benefit the accused, failures to object or to request instructions are often consistent with an effort to win a case. Where specific derelictions are alleged, therefore, courts should scrutinize the reasons for the apparent dereliction. Inquiry may reveal that it was not due to ignorance or inattention but was a reasonable tactical judg-

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[40] The distinction between pervasive incompetence and discrete errors, and the propriety of looking for "prejudice" in the latter case but not in the former, has been recognized by *United States ex rel Green* v. *Rundle*, 434 F.2d 730 (3d Cir. 1970); *Wade* v. *Franzen*, 678 F.2d 56, 59 (7th Cir. 1982); *Harris* v. *Housewright*, 697 F.2d 202, 212 (8th Cir. 1982); *United States* v. *Porterfield*, 624 F.2d 122, 124-125 (10th Cir. 1980). A divided panel in the Ninth Circuit rejected the distinction in *Ewing* v. *Williams*, 596 F.2d 391 (1979). It acknowledged the difficulty, however, of finding no prejudice in pervasive incompetence cases. Moreover it recognized, as the *en banc* court had recognized in *Cooper* v. *Fitzharris*, 586 F.2d 1325 (9th Cir. 1978), that a court can find "unfairness—and thus prejudice—emanating from the totality of counsel's errors and omissions."

The distinction made by the above courts and urged here by respondent can also be harmonized with the principle that precludes harmless error rulings in Sixth Amendment cases. A claim that counsel was incompetent in failing to object, for example, should not normally be elevated above what it would have been had the objection been made and *overruled*. Thus, if overruling the objection would be harmless error, counsel's failure to object was probably not "gross."

ment. If so, there would be no "substantial" deviation and the inquiry would end. If, on the other hand, such inquiries reveal that the dereliction was "substantial," it would be appropriate to ask whether, in context, it was also substantial or significant in the sense that it had a "reasonable likelihood," see *United States* v. *Agurs*, 427 U.S. 97 (1976), of affecting the outcome. If the answer is negative, then no "gross" dereliction occurred and the accused was not denied effective assistance of counsel.[41] If the answer is yes, there is no need for an inquiry into "prejudice." To require, as petitioner suggests, a showing of "gross dereliction" *and* "prejudice" is duplicative and confusing.[42]

This Court should resist petitioner's suggestion that the criteria for reversal of a conviction for ineffective assistance

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[41] However, the matter is not always that simple. Some trial errors, e.g., adverse judicial comment on the failure of the accused to testify, racially derogatory remarks, refusal to permit a summation, require reversal even when they are not in any sense outcome-determinative. In short, since there really is no generally applicable rule of "harmless error," distinctions in the strength of the policies underlying various rules of procedure should be preserved. Analysis of discrete derelictions by defense counsel should not mute all distinctions in types of trial error under the blanket of harmless error or, as respondent formulates it, "non-gross" error by defense counsel. As Judge Bazelon cogently asked, of "what possible significance is it to the defendant whether his counsel fails to present closing argument because the court denies him that opportunity, see *Herring* v. *New York*, 422 U.S. 853 (1975), or because he foregoes it in order to avoid a parking ticket?" *United States* v. *Decoster*, *supra*, 624 F.2d at 289, n. 126 (dissenting opinion). This analysis suggests that there should be a two-pronged inquiry in some cases: (1) whether the error for which counsel's ineffectiveness is at least partly responsible had any reasonable likelihood of affecting the verdict, and (2) if not, whether the error, had it been committed by the judge over proper objection, would nonetheless have required reversal. A negative answer to the first question and an affirmative answer to the second wouldn't necessarily require reversal, but it would suggest a more detailed analysis.

[42] See *Identifying and Remedying Ineffective Assistance of Criminal Defense: A New Look After* United States v. Decoster, 93 Harv. L. Rev. 752, 768 (1980), criticizing the plurality opinion in *United States* v. *Decoster*, *supra*, note 22, on this ground.

should be made symmetrical to the "cause and prejudice" requirements in federal habeas corpus (Pet. Br. 22). Such requirements, unlike a claim of ineffective assistance, are jurisdictional requirements, not elements of a constitutional claim. They are imposed in the interests of comity, federalism and finality upon an accused who has already had a "full and fair opportunity" to defend himself, to appeal, and to avail himself of state collateral remedies. They are imposed to encourage defendants and their attorneys to abide by procedural rules; to make the trial the "main event." *Wainwright* v. *Sykes*, 433 U.S. 72, 90 (1977). They have no place here, on direct appeal.

While ineffectiveness is a factor used in determining whether to give effect to procedural defaults in a *habeas* case, there are many others. See *id.*, at 94-96 (Stevens, J., concurring). Included are the values of the particular constitutional right allegedly forfeited. *Cf. Stone* v. *Powell*, 428 U.S. 465 (1976); *Rose* v. *Mitchell*, 443 U.S. 545 (1979). Moreover, these requirements relate to specific, discrete procedural defaults. The burden on an accused who seeks to be relieved from a conviction for ineffective assistance based solely upon such a procedural default should in some cases be higher than the "cause and prejudice" requirements,[43] sometimes lower,[44] but always different. If pervasive, cumulative or basic incompetence is claimed, the issues are *entirely* different than those of "cause and prejudice." There may be no "cause and prejudice" which would warrant relief from a particular pro-

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[43] Unless, of course, the Court accepts the wholly untenable position asserted implicitly by petitioner in its *Amicus* brief in *Strickland* v. *Washington*, *supra*, that a habeas corpus petitioner must establish his probable innocence in order to show "prejudice" under those standards.

[44] If, for example, defense counsel were not to object to evidence which was the fruit of a patently unconstitutional seizure because he or she did not personally believe in the exclusionary rule, or because he or she had never heard of it, and such evidence was harmful to the outcome, it is difficult to see how or why a court should deny relief based upon ineffective assistance, yet it is far from clear that "cause and prejudice" would be satisfied. *Cf. Stone* v. *Powell*, *supra*.

cedural default yet gross incompetence may still require that the conviction be set aside.

It is true, as petitioner suggests (p. 22), that the more stringent the requirements for "cause and prejudice," the greater the incentive of an accused to attack his counsel's competence. But this is because restrictions on collateral attack, in making the trial the "main event," have greatly increased the importance of effective assistance. The assumptions upon which efforts are made to finalize a trial and direct appeal must have some relationship to reality.

C. *There were numerous derelictions of respondent's counsel, amounting to pervasive incompetence.*

Assuming *arguendo* that respondent was obliged to demonstrate that his counsel failed to perform functions that are reasonably expected of defense counsel and that such failures were "gross," they leap from the record.

1. Counsel neither interviewed nor attempted to interview the prosecution's eighteen witnesses. He also failed to seek and obtain any prior statements of such witnesses made to the government. Failure to interview witnesses is presumptive ineffective assistance. *McQueen* v. *Swenson*, 498 F.2d 207 (8th Cir. 1974); *Eldridge* v. *Atkins*, 665 F.2d 228 (8th Cir.), *cert. denied*, 456 U.S. 910 (1981). Failure to request Jencks Act material is surely in the same category. *Cf. Adams* v. *Balkom*, 688 F.2d 734 (11th Cir 1982); *Brubaker* v. *Dickson*, 310 F.2d 30, 35 (9th Cir.), *cert. denied*, 367 U.S. 824 (1962).

2. Counsel made only ten objections, none of which was coupled with any reference to any rule of evidence. He never objected to leading questions and permitted most of the prosecution witnesses to testify in lengthy, rambling narratives that were filled with hearsay and opinion, including opinions on ultimate facts, *e.g.*, that there was a "check-kiting scheme." The adversarial nature of the trial evaporated. Compare, *United States* v. *Easter*, 539 F.2d 663 (8th Cir. 1976); *Harris* v. *Housewright*, *supra*; *Griffin* v. *Winans*, 684 F.2d 686, 690 (10th Cir. 1982).

3. Counsel failed to obtain the services of an accountant, despite his own acknowledged "pressing need" for same, *Cf. United States* v. *Fessell*, 531 F.2d 1275 (5th Cir. 1976). He also failed to call a witness, or effectively employ a prosecution witness, to provide needed expert testimony. Counsel should have proved that writing checks to obtain the benefit of the "float" and to impress bankers with balances and activity is both common and legitimate. As the court told the jury at the outset, the government's case was predicated on the theory that writing a check on one bank account and depositing it in another, intending to cover it by reversing the process, was "fraudulent" (T. 7). One of the banker witnesses testified to virtually the same thing (T. 104). In fact, such practices, or practices very close to them, are commonplace, and are not regarded as fraudulent or even immoral. A popular book, for example, advises that the way to develop a good credit standing with banks is to borrow from one bank, repay with a loan from a second bank, and so on.[45] The distinction between that and what respondent advised Cummings to do is thin. Banks and other businesses throughout American play the "float" on a grand scale, using techniques very similar to respondent's. The businesses pay their bills with checks drawn on distant banks so they can use the money during the clearing process. Banks often deny depositors immediate credit for ten or fifteen days so they can have interest-free use of the money between the date of actual clearance and the date the deposit is

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[45] ". . . you can borrow $10,000 from bank number one. When it is due, you repay it with $10,000 borrowed from bank number two. When that comes due, you pay it off with a new loan from bank number one. If you want to get complicated, pay that loan off with a loan from number three.

The result is that your $10,000 is always *rolling over* between banks. . . . As mentioned, banks do not particularly like this double or triple borrowing mode of operation. Yet all big companies and all Tycoons operate on borrowed money from multiple lenders in much the same way." B. Greene, Think Like a Tycoon, 50-51 (1980).

cleared.[46] Counsel's failure to have adduced such evidence—given the court's remarks and the banker's testimony—left the jury with the clear impression that respondent lied when he told Cummings that "all companies do this" (J.A. 83), and that in fact the only people who do it are swindlers. The failure to remove or attempt to remove such erroneous impressions was manifest incompetence and denied the respondent a defense. See *Gaines* v. *Hopper*, 575 F.2d 1147 (5th Cir. 1978); *Baldwin* v. *Maggio*, 704 F.2d 1325, 1332 (5th Cir. 1983).

4. Counsel cross-examined perfunctorily, and primarily to prove an issue that was wholly immaterial: that respondent neither owned the business nor wrote the checks. Had counsel understood elementary principles of complicity, see LaFave & Scott, Criminal Law 502-519 (1972), he would have known that this line of examination was tantamount to surrender. This "defense" was pursued from the opening statement through the summation.

5. Counsel failed to identify, prepare or present respondent's only possible defense in the case, an obvious defense: there was no fraud and no intent to defraud. No misrepresenta-

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[46] M. Mayer, The Bankers, 137-142 (1974). "Float" is two credit balances represented by the same funds. *Id.*, at 137. A study for the American Banking Association estimated that there was transit float in the banking system in 1969 of $120 billion. *Id.*, at 142. Banks themselves are the biggest float players of all. If, for example, a state government makes a deposit the day it delivers checks, the bank will predict how long it takes for the checks to arrive and invest the money in short-term money-market instruments. *Id.*, at 138. Bankers refer to this as "cash management" and the managers as "float managers." They hold seminars on how to maximize float and how to deal with the increased sophistication of corporate cash managers, who are also on to "float" and thus don't leave large cash deposits sitting around for very long. See, *e.g.*, Bank Administration Institute, *Contemporary Issues in Cash Management* (Miami, Florida, October 26-29, 1980).

Fewer than 30% of checks deposited in banks are drawn on the bank in which deposited; more than 70% must be cleared and thus create "float." *Lumbering at Top Speed: The Check Collection System*, 1951-1979, Economic Review, Federal Reserve Bank of Atlanta, 29 (March, 1982).

tions of any kind were made to the Norman bank, by respondent or anyone else. See *Williams* v. *United States*, ___ U.S. ___, 102 S. Ct. 3088 (1982).

The government's own evidence supported this defense. Contrary to the allegations in the indictments, Skyproof was not a "facade" or sham. It was a very substantial, growing company. Its subsidiary, Paris Processing, was also a substantial, growing company, which Skyproof greatly improved. Because Skyproof was rapidly expanding and Paris was newly-acquired, the books were not in order. The net overdraft was only 4.5%, consistent with a bookkeeping error, especially given the quality of the bookkeeping, and the fact that respondent was far removed from what books there were when the overdraft occurred: he was in Paris, Texas, fixing up the bottling plant.

Nor was the Norman bank damaged. When apprised of the problem, respondent immediately suggested that it must have been a bookkeeping error and that, in any event, the overdraft, if there was an overdraft, would be made good. At the same time, he delivered an authorization to the Norman Bank officials to withdraw all collected funds at the Tampa Bank, some $500,000. Skyproof then hired a CPA to analyze the bank accounts and turned the report, which was accurate, over to the Norman Bank. Shortly thereafter, Skyproof gave the Norman bank a mortgage on everything it owned, including its Tampa plant and the Paris bottling company. This mortgage authorized an immediate takeover by the bank, and the bank almost immediately took over the bottling plant. It later sold the bottling plant for $504,000, almost $100,000 more than the net overdraft, for a tidy profit. In addition to that profit, it had operated the plant for more than two years and gave Skyproof no credit for any of those profits. If there was a swindler, it was not respondent—it was the Norman bank.[47]

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[47] Which, although it made a profit of approximately $100,000 from Skyproof, tried to use the criminal process to collect another $350,000 from respondent.

This very substantial defense was not only destroyed by reliance upon irrelevant technicalities appropriate only in land litigation, it was negated by the failure of defense counsel to realize that the bank had made a profit. Instead, the case went to the jury with the false testimony of the bank officials, that they had suffered a loss in excess of $400,000, unchallenged.[48]

The failure to recognize and assert a viable defense is gross incompetence, under any standard. *United States ex rel. Green* v. *Rundle, supra; Hintz* v. *Beto*, 379 F.2d 937 (5th Cir. 1967); *Young* v. *Zant*, 677 F.2d 792 (11th Cir. 1982). This defense would have certainly suggested itself to competent counsel. "The defense actually tendered was so insubstantial in relation to the one not offered as to [belie] the hypothesis that trial counsel made a deliberate informed choice," *Brubaker* v. *Dickson, supra.*

6. Mr. Colston called no witnesses. His failure to do so stemmed from his preposterous theory that respondent wasn't guilty because he didn't write the checks. While the failure to call witnesses or put on a case can sometimes be attributed to tactics, where "the lawyer is completely inexperienced in criminal litigation . . . the hypostastization of a subtle and far-seeking strategy . . . is unconvincing. [Respondent's] lawyer did not have enough criminal experience to depart from the book with any hope of success." *Wade* v. *Franzen*, 678 F.2d 56, 58 (7th cir. 1982).

7. Mr. Colston's ignorance of criminal law also deprived respondent of numerous favorable instructions to the jury. Since he had put on no defense, it was important that the jury be instructed on this matter as favorably as the law allows. Respondent was entitled, according to the standard form book on jury instructions, 1 Devitt & Blackmar, Federal Jury Practice and Instructions (3d ed. 1977), to several relevant, helpful

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[48] Even during the sentencing phase, counsel did not question the testimony about the large losses and permitted the court to sentence respondent on the assumption that such losses had been inflicted (J.A. 106-107).

charges: that the number of witnesses on a side is not determinative (§ 17.20), that the jury need not accept uncontradicted testimony (§ 17.21) and, most importantly, that the defendant had no "burden or duty of calling any witnesses or producing any evidence" (§ 17.14). None of these standard instructions was requested; none was given.

On the substantive issues, respondent was entitled to a charge that the mere depositing of a check is not a representation that there are funds on deposit sufficient to pay it. *Williams* v. *United States*, *supra*.[49] No such instruction was given and nothing said in the charge contradicted the court's preliminary remarks clearly implying the opposite (T. 7). Since the theory of the indictment and the government's case was other-

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[49] This Court held, in *Williams* v. *United States*, *supra*, in a "check kiting" prosecution under 18 U.S.C. § 1014, that the depositing of an insufficient fund check is not a "false statement" within the meaning of § 1014. This holding was based on "a simple reason: technically speaking, a check is not a factual assertion at all, and therefore cannot be characterised as 'true' or 'false'." Checks, the Court said, do "not, in terms, make any representation as to the state of [the drawer's] bank balance." 102 S.Ct. at 3092. On the contrary, they are an undertaking that if dishonored, the drawer will pay the check. *Ibid.* Since the Court's decision was based on a combination of common sense and the Uniform Commerical Code, and not the legislative history or arcane meaning of § 1014, the holding is clearly applicable to a mail fraud prosecution, *Cf. United States* v. *Elliott*, 689 F.2d 178 (10th Cir. 1982). The Court went on, moreover, to reject the government's argument that there is a "general understanding" that the drawer "had funds on deposit sufficient to cover the face value of the check." Such an interpretation, the Court said, "would make a surprisingly broad range of unremarkable conduct a violation of federal law." *Id.* at 3093. Moreover, it is "equally plausible to suggest that many people understand a check to represent that the drawer will have sufficient funds deposited in his account by the time the check clears, or that the drawer will make good the face value of the draft if it is dishonored by the bank." *Id.* at 3092, n.7. *Williams* was, of course, decided after respondent's trial. However, there was substantial authority supporting its conclusion in the hornbooks. LaFave & Scott, Criminal law, 679 (1972). See also, *Williams* v. *United States*, 278 F.2d 535 (9th Cir. 1960); Anno., *Reasonable Expectation of Payment as Affecting Offense Under "Worthless Check" Statutes*, 9 ALR 3d 719, 721 (1966).

wise, and there was no evidence of any fraudulent representations, by anyone, the giving of such an instruction may itself have produced an acquittal.

If respondent made a bookkeeping error or had a reasonable expectation that the checks would be honored, whether from funds on deposit, funds to be deposited, or the informal extension of credit, he had no intent to defraud.[50] He was entitled to a "good faith" instruction. *Steiger* v. *United States*, 373 F.2d 133, 135 (10th Cir. 1967). He did not receive anything of the kind.

It is also clear that when a defendant in a mail fraud case predicated on check-kiting reimburses the alleged victim, this is evidence that he had no intent to defraud, and respondent was entitled to an instruction to that effect. *United States* v. *Foshee*, 569 F.2d 301, modified on rehearing, 578 F.2d 629 (5th Cir. 1978). No such charge was requested; none was given.

The failure to request favorable charges to the jury, to which the accused is plainly entitled, is ineffective assistance of counsel. *Taylor* v. *Starnes*, 650 F.2d 38, 41 (4th Cir. 1982); *Harris* v. *Housewright*, *supra*.

This list of derelictions could be extended, almost indefinitely.[51] It is surely enough, however, to persuade the

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[50] Indeed, there is some authority, consistent with the *dictum* in *Williams*, see note 49 *supra*, that it is enough that the drawer of the check intends to make good on the check after it bounces. See *United States* v. *Foshee*, 578 F.2d 629 (5th Cir. 1978). It seems reasonably clear that the fraudulent intent necessary to constitute a violation of § 1341, *via* check-kiting, is an intent to deprive permanently the bank of its money. In any event, that was the theory of the indictment in the present case. On the facts of this case, moreover, the only thing that the bank could have been deceived about was the respondent's intention to make good on the checks. It was quite clear to the Norman bank that "floating" was taking place. The bank chose to overlook that, either because it valued Skyproof's business or because the "floating" increased its own deposit balances and lending power, or a combination of both.

[51] If, as the petitioner suggests, Colston's failure to renew his motion for continuance was a waiver of the defendant's right to adequate preparation time or an acknowledgement of readiness, this too was ineffective assistance.

Court that the decision below was correct, not only in its result but in its approach. Where it is plain that there was pervasive incompetence, the cumulative effect of which is a gross departure from the standards which are expected of defense counsel, it is a waste of judicial resources to pick the record apart and evaluate every misstep in the trial. It compounds the waste to detail the derelictions in an opinion. Moreover, to spread on the record counsel's glaring blunders would quite unnecessarily, and unfairly, leave the impression that the farce that resulted was entirely his fault. In truth, the trial judge was as responsible, if not more responsible, as he.

D. *The court below properly granted relief on appeal*

Where a claim of ineffective assistance is raised on direct appeal and the record needs enlargement, an appellate court should remand for a hearing, as in *United States* v. *Decoster*, *supra*. Where, however, effective *or* ineffective assistance is palpable, there is no reason to remand. Judicial resources would be wasted and resolution of the matter unnecessarily delayed. See *United States* v. *Aulet*, 618 F.2d 182, 186 (2d Cir. 1982); *United States* v. *Payne*, 641 F.2d 866 (10th Cir. 1982); *United States* v. *Fisher*, 477 F.2d 300 (4th Cir. 1973).

Deciding on the record was particularly appropriate here because this was not an ordinary ineffective assistance case. The trial judge's rulings were inextricably involved in the questions before the appellate court. Little could have been learned on remand that would have helped the government. The trial judge would not be likely to reconsider his rulings,[52] so

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United States ex rel Williams v. *Twomey*, *supra*. Colston was also seriously derelict in failing to renew the motion to disqualify Levine from representing Cummings. Since Cummings became a prosecution witness, Levine in effect joined the prosecution team. The content and direction of respondent's defense, facts which respondent had made available to Levine, and confidential communications may all have been used against respondent. A record should have been developed on this matter. The trial judge did not foreclose it (J.A. 32).

[52] The trial judge's disinclination to reconsider the matter is evidenced by his denying without a hearing Colston's motion for a new trial, which alleged

a remand would in all likelihood require another appeal, and, ultimately, a reversal.

The government rarely, if ever, objects to a claim of ineffective assistance being considered on appeal, provided the claim is rejected, see *United States* v. *Gibson*, 690 F.2d 697 (9th Cir. 1982); *United States* v. *Altamirano*, 633 F.2d 147 (9th Cir.), cert. denied, 454 U.S. 839 (1980); *United States* v. *Payne*, *supra*, even though affirmance will prove a severe handicap to a defendant's post-conviction attempts to litigate the same issue.[52] Here, the government was happy to have respondent's claims considered on their merits by the Tenth Circuit—until the government lost. No suggestion of a remand was made by the government below. The government should now be estopped from asserting that the record was insufficient to permit reversal.

Petitioner would require a defendant to seek post-conviction review in order to get relief from ineffective assistance (Pet. Br. 40 n. 30). This is not only inconsistent with this Court's efforts to enhance the finality of judgments by restricting post-conviction review, see *United States* v. *Frady*, 456 U.S. 152 (1982), it denigrates the fundamental right to counsel almost to the point of extinction. Once his appeal is exhausted, the indigent defendant no longer has a right to court-appointed counsel. See *Ross* v. *Moffitt*, 417 U.S. 600 (1974). The accused who retained counsel for the trial and the appeal will often have no more funds for post-conviction counsel. Yet there are few

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lack of opportunity to prepare, and by his declining to hold a hearing on respondent's post-trial motion which contained numerous documents, affidavits, and allegations not only of lack of preparation and incompetence but of governmental reliance on perjury. It is plain that the pendency of an appeal did not preclude the trial court from holding a hearing on that motion. *United States* v. *Siviglia*, 686 F.2d 832, 835 (10th Cir.), *cert. denied*, 103 S.Ct. 1902 (1982).

[52] See *Chin* v. *United States*, 622 F.2d 1090 (2d Cir. 1980), *cert. denied*, 450 U.S. 923 (1981) (issue raised and decided on appeal cannot be relitigated on a § 2255 motion absent intervening change in law).

situations in which a defendant needs assistance of counsel more direly than when he attacks the effectiveness of trial counsel.

Petitioner would thus force a defendant, usually without counsel, and often in prison, to prepare pleadings which would induce the district court to grant a hearing—a formidable burden indeed[54]—and then, perhaps with counsel then assigned, see *Johnson* v. *Avery*, 393 U.S 483, 487 (1969), prove not only that his attorney was incompetent but that the incompetence *produced* the conviction. See Brief for the United States as *Amicus Curiae*, Supporting Petitioners, *Strickland* v. *Washington*, *cert. granted*, no. 82-1554, pp. 12-26 ("defendant must demonstrate that the evidence probably would have affected the outcome of the proceedings"). By thus "papering over the problem,"[55] petitioner would have succeeded in requiring all defendants with incompetent counsel to prove their innocence, and requiring most of them to make at least a preliminary showing of such without the assistance of counsel!

III

IF THE COURT DOES NOT AFFIRM, IT SHOULD REMAND TO THE COURT OF APPEALS FOR FURTHER CONSIDERATION

Since the record clearly supports reversal of respondent's conviction and petitioner does not appear to contend otherwise, the only basis upon which the Court could conceivably fail to affirm the court below is for deficient reasoning or explication thereof. In that event, it should be given an opportunity to provide the required explication.

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[54] See Rules 4, 8, 9(a), Rules Governing Section 2255 Proceedings for the United States District Court, 28 U.S.C.A.

[55] See Bazelon, *The Defective Assistance of Counsel*, 42 U. of Cinn. L. Rev. 1, 20-40 (1973). Judge Bazelon argues that a proposal such as petitioner's would "emasculate the Sixth Amendment," *Id.*, at 27.

Another reason for such a remand is that there are two other bases, at least, upon which the court below could have reached the same ultimate conclusion it reached. First, the Speedy Trial Act, 18 U.S.C. § 3161(c)(2), provides: "Unless the defendant consents in writing to the contrary, the trial shall not commence less than thirty days from the date on which the defendant first appears through counsel or expressly waives counsel and elects to proceed pro se." This *minimum* period is mandatory, as the cases cited by petitioner (Pet. Br. 37, n. 26) concede. In a case of first impression, the Court of Appeals for the Ninth Circuit recently held that when a defendant appears through different counsel at different stages, the thirty day period begins to run anew when the lawyer who tries the case enters his appearance. This is because the thirty day period is designed to provide a minimum time for such counsel to prepare. The words, "first appears through counsel" refer to the lawyer who actually prepares the defense used at a trial. Accordingly, where a defendant changed lawyers and was brought to trial 29 days after he first appeared with his trial attorney, the Act required that his conviction be reversed. *United States* v. *Daly et al.*, Nos. 81-1654, 81-1655, 81-1657, 81-1661, 81-1771 (8/12/83) slip op. Since Colston appeared only 25 days before trial, and requested a minimum of 30 days to prepare, *Daly* plainly would require reversal of the conviction.

The second basis is the supervisory power. The record suggests several aspects of the trial court's handling of the matter that could appropriately be regulated by the supervisory power, e.g., the process of selecting appointed counsel, inquiries into the competence and experience of counsel, responding to complaints by defendants about their counsel, judicial responses to claims of inability to prepare, pretrial and trial supervision of counsel. Such issues are analogous to other problems of assuring effective assistance which the Courts of Appeals have chosen to regulate under the supervisory power, and which regulation this Court has recently approved. *Cuyler* v. *Sullivan*, *supra*, 446 U.S. at 346, n. 10. The opinion below does not squarely rest on the Constitution and may therefore

reflect an implicit invocation of supervisory power. Should this Court find there were no constitutional violations, the court below might want explicitly to base its judgment on the supervisory power. See *United States* v. *Milligan*, 414 F.2d 811 (5th Cir. 1969). It should, in any event, be permitted to consider that issue before its judgment is ultimately reversed. Cf. *United States* v. *Hasting*, ___ U.S. ___, 103 S. Ct. 1974 (1983), 1982 n. 1 (Stevens, J., concurring in the judgment), 1987 (Brennan, J., dissenting).

CONCLUSION

The judgment of the Court of Appeals should be affirmed. Alternatively, it should be remanded for further consideration.

Respectfully submitted,

STEVEN DUKE
Attorney for Respondent

Supreme Court, U.S.
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CLERK

No. 82-660

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

HARRISON P. CRONIC

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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REPLY BRIEF FOR THE UNITED STATES

Respondent concedes that this case ordinarily would not require more than 25 days to prepare for trial and that the Constitution did not require the district court to appoint counsel who had more experience in criminal cases than did Chris Colston, his attorney. He nevertheless asserts, somewhat inconsistently, that the court of appeals correctly reversed his conviction without identifying any deficiencies in counsel's actual performance because the district court made adequate representation "impossible" by allowing Colston "only" 25 days to prepare for trial. There is, however, no basis for concluding that it was "impossible" for Colston to prepare this straightforward check-kiting case in the 25 days allowed.

Perhaps recognizing the flaws in the court of appeals' approach, respondent devotes the major portion of his brief (Resp. Br. 35-62) to an alternative argument: that

the court of appeals could have found a Sixth Amendment violation based on what respondent asserts were deficiencies in counsel's actual performance. But the court of appeals did not decide the case on that ground, and the district court likewise did not address these issues. Accordingly, this Court would not normally pass on respondent's complaints about his attorney in the first instance. Nor is there any reason to remand the case for that purpose.

Respondent has combed the record in search of ways in which to second-guess counsel's trial strategy, to imply that counsel was negligent and failed to investigate, and to create the impression that counsel did not understand governing legal principles. These contentions are entirely unsubstantiated on the present record, and the particular defenses respondent now suggests that counsel should have pursued are without basis in fact or law. The evidence at trial established that respondent was caught red-handed in a classic check-kiting scheme of the kind that long has been held to violate 18 U.S.C. 1341. Respondent's attempt to attack his conviction by attacking his attorney in these circumstances underscores the need for the Court to articulate a test for ineffective assistance of counsel that requires a threshold showing of a substantial defect in the proceedings, instead of focusing on the performance of the attorney in the abstract. The convicted defendant should be required to show that counsel's performance fell materially below the minimum acceptable level of competence and in turn had a probable effect on the outcome of the case or undermined the fundamental fairness of the proceedings.

1. Respondent first contends (Resp. Br. 24-35) that the court of appeals correctly reversed his conviction on the ground that inadequate representation could be "inferred" in this case without the need to "show specified errors in the conduct of his defense" (Pet. App. 3a-4a). In respondent's view, this case involves the kind of external restraint on counsel's performance for which au-

tomatic reversal is required,[1] because the trial court made adequate preparation "impossible" by granting Colston, who did not have prior experience in criminal trials, "only" 25 days to prepare (Resp. Br. 28). This reasoning is seriously flawed.

a. As an initial matter, respondent's contention is substantially undermined by his repeated concession (Resp. Br. 31, 33, 44-45, 47) that he had no constitutional right to have the court appoint a lawyer who had more experience in criminal cases than did Colston. This concession is sound. As we have explained in our opening brief (Gov't Br. 39-41), "in determining whether there has been effective assistance, the primary focus must be on how well counsel performed in the particular case, not on how much experience counsel has had. * * * Counsel may sometimes compensate for their lack of experience by unusual zeal and industry." *Harris* v. *Housewright*, 697 F.2d 202, 205 (8th Cir. 1982) (footnote omitted).

There is, moreover, no reason to believe that the Framers of the Sixth Amendment intended the term "Counsel" to mean something more than a member of the bar admitted to practice before the court. The Judiciary Act of 1789, ch. 20, 1 Stat. 73 *et seq.*, which was signed one day before the Sixth Amendment was proposed (*Faretta* v. *California*, 422 U.S. 806, 831 (1975)), reflects this understanding. Section 35 of that Act provided that "in all the courts of the United States, the parties may plead and manage their own causes personally or by the assistance of such counsel or attorneys at law as by the rules of the said courts respectively shall be permitted to manage and conduct causes therein." 1 Stat. 92; 28 U.S.C. 1654. These standards were met in this case. It is undisputed that Colston was a member of the Bar of

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[1] See Resp. Br. 30-32, citing *Holloway* v. *Arkansas*, 435 U.S. 475 (1978); *Geders* v. *United States*, 425 U.S. 80 (1976); *Herring* v. *New York*, 422 U.S. 853 (1975); and *Brooks* v. *Tennessee*, 406 U.S. 605 (1972).

Oklahoma [2] admitted to practice before the district court and that he was selected to represent respondent in accordance with the district court's plan under the Criminal Justice Act (CJA) (J.A. 38). 18 U.S.C. 3006A(a).

Unlike respondent, amici do contend that "[s]omething more than a license to practice [law] is necessary • • • where the client will probably be imprisoned" (NACDL Br. 22). But NACDL nowhere attempts to find support for this view in the text, history, or purposes of the Sixth Amendment. Nor does NACDL define what the "[s]omething more" it urges should consist of, and it states that this Court likewise need not fashion a "bright line" test (NACDL Br. 22). NACDL instead proposes that the trial court inquire on a case-by-case basis into the "skill, qualification, ability, training and experience" of counsel (NACDL Br. 23). This approach would impose a substantial burden on trial courts, which now may rely on readily ascertainable eligibility criteria that reflect the expert judgment of the responsible licensing authority or other body regarding the minimum qualifications necessary to appear in the case, including any special certification of competence in trial advocacy or criminal defense.

Indeed, whether counsel in criminal prosecutions should possess qualifications in addition to admission to the bar and the details and manner of implementation of any such requirement are matters uniquely appropriate for resolution through legislation, the promulgation of court rules, revision of CJA plans and parallel state programs, and initiatives by the bar and law schools. See Burger, *Some Further Reflections on the Problem of Adequacy of Trial Counsel*, 49 Fordham L. Rev. 1 (1980).[3] The bare

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[2] According to the 1983 edition of the *Martindale Hubbel Law Directory* (at 617B), Colston was admitted to the Oklahoma Bar in 1975, five years before the trial in this case.

[3] Contrary to respondent's assertion, we do not suggest in our opening brief (Gov't Br. 19-20) that "constitutional concepts should

terms of the Sixth Amendment furnish no guidance on these issues. The adoption by this Court of rigid requirements directly under the Sixth Amendment also would intrude upon the traditional prerogative of the states to regulate the practice of law and would stifle the very type of experimentation in improving the quality of representation that NACDL and others urge. NACDL Br. 22-24; NLADA Br. 52-53; Resp. Br. 47.

b. Respondent also expressly concedes that the trial court "was under no necessary obligation, under the Constitution, to allow more than twenty-five days to prepare" for trial in this case (Resp. Br. 33; see also *id.* at 28). But he nevertheless contends (Resp. Br. 28-30) that the trial court made adequate preparation "impossible" within that time because it appointed an attorney who did not have prior criminal trial experience. This contention is without merit. There is no basis in the present record or in common sense for concluding that Colston was effectively *precluded* from preparing for trial in the time that respondent concedes would ordinarily be constitutionally adequate. To the contrary, the indications are that Colston performed conscientiously and thoroughly in the face of a compelling case against his client. The

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play no part in remedying incompetence" (see Resp. Br. 39). We agree that the Sixth Amendment may furnish a basis for relief in an appropriate case if the attorney's performance departed significantly from the range of competence reasonably expected of defense counsel, to the substantial detriment of the accused. The point in our opening brief is simply that Sixth Amendment analysis should focus on the effect of counsel's actions on the rights of the accused in the particular case, and should not be employed by a court sitting to review a final judgment of conviction as a means to accomplish broader ends beyond the case before it—*e.g.*, to improve the quality of the defense bar generally. That is more properly the role of those who are charged with addressing the problems of the legal profession from a broader perspective. Reversal of a conviction in an individual case would in any event be a most attenuated and inefficient way to attempt to solve the systemic and elusive problem of attorney competence generally.

timing of Colston's appointment therefore was simply not the sort of external impediment from which it must be conclusively presumed that the accused received ineffective assistance, without regard to counsel's actual performance. Compare *Powell* v. *Alabama*, 287 U.S. 45, 71 (1932) (effective assistance "preclude[d]" by designation of responsible counsel on day of trial).[4]

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[4] This case does not remotely resemble the decisions of other courts of appeals that respondent contends (Resp. Br. 29 & n.15) are "plainly in line" with the decision below. See *Rastrom* v. *Robbins*, 440 F.2d 1251, 1255 (1st Cir.), cert. denied, 404 U.S. 863 (1971) (inexperienced counsel was given four hours to prepare for trial; counsel declared he was not prepared; defendant was mentally unstable); *United States* v. *Knight*, 443 F.2d 174, 177 (6th Cir. 1971) (counsel allowed 30 minutes between appearance and trial and "was denied any opportunity whatsoever to interview witnesses or otherwise to investigate the case"); *United States ex rel. Williams* v. *Twomey*, 510 F.2d 634 (7th Cir.), cert. denied, 423 U.S. 876 (1975) (inexperienced counsel appointed on day of trial; no opportunity to interview or call co-defendant who would have given exculpatory testimony); *Wolfs* v. *Britton*, 509 F.2d 304 (8th Cir. 1975) (request for continuance denied even though counsel had only 1½ days to prepare, there were "inexplicable" circumstances in the offense and a possible psychiatric defense, and counsel was unable to contact out-of-state witnesses); *MacKenna* v. *Ellis*, 280 F.2d 592 (5th Cir. 1960), aff'd per curiam, 289 F.2d 928 (en banc), cert. denied, 368 U.S. 877 (1961) (inexperienced counsel who had a conflict of interest because of pending applications for employment with prosecutor did not adequately resist prosecutor's request to advance trial date, even though defendant objected and was unable to contact numerous alibi and character witnesses who later filed supporting affidavits); *Garland* v. *Cox*, 472 F.2d 875 (4th Cir. 1973) (counsel not appointed until day of trial and conferred with defendant for 15 or 20 minutes prior to trial).

In *Moore* v. *United States*, 432 F.2d 730, 735, 738-740 (3d Cir. 1970) (en banc), the court affirmatively rejected a presumption of ineffectiveness resulting from late appointment of counsel and remanded for consideration of specific deficiencies in counsel's performance. *Moore* obviously does not support the automatic reversal of respondent's conviction here without regard to counsel's performance. Similarly, in *Coles* v. *Peyton*, 389 F.2d 224 (4th Cir. 1968), cert. denied, 393 U.S. 849 (1968), the court identified specific and substantial errors in counsel's performance.

Furthermore, if, as respondent concedes, the court's designation of Colston satisfied the constitutional requirement that "Counsel" be appointed, the time that ordinarily would be sufficient for "Counsel" to prepare a case of this sort for trial cannot be conclusively presumed to be inadequate. At least that is so in this case, where the trial was not held only a day or two after counsel was appointed. Colston had ample time in 25 days to compensate for his lack of prior experience by, for example, seeking the advice of more experienced counsel if necessary. And the affidavit filed by the government in the court of appeals indicates that Colston in fact did receive the assistance of an experienced criminal lawyer, Ryland Rivas, in preparation of the case and at trial (Gov't Br. App. 1a).[5]

c. The other factors respondent cites (Resp. Br. 29) to support his claim that Colston had insufficient preparation time are insubstantial. First, the fact that respondent faced a maximum of 65 years' imprisonment on a 13-count indictment reveals nothing about the preparation time required. The 13 counts in the indictment were based on 13 similar transactions in one overall course of conduct. Second, the fact that the indictment was returned 4½ years after the crimes were committed is not a measure of the time defense counsel needed, especially since the government made the fruits of its investigation available to Colston (J.A. 35). Third, there is no indication that the fact that witnesses resided in four states had any adverse effect on counsel's preparation.

Finally, contrary to respondent's assertion (Resp. Br. 29), a mail fraud case is not inherently "complex and arcane." There are but two elements of the offense:

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[5] Respondent attempts to dismiss Rivas's role by asserting that "[t]he record establishes that if [Rivas] was present, it was as little more than a spectator" (Resp. Br. 17). The record establishes no such thing. It is true that Rivas did not actually conduct the defense at trial. But this does not undermine Rivas's averment that he assisted Colston prior to and during trial.

"(1) a scheme to defraud, and (2) the mailing of a letter, etc., for the purpose of executing the scheme." *Pereira* v. *United States*, 347 U.S. 1, 8 (1954). Here, the use of the mails was established by testimonial and documentary evidence (Gov't Br. 4), and indeed the delay in clearing checks occasioned by the use of the mails was responsible for the "float" that respondent concedes was created (see Resp. Br. 55, 60 n.50). See, *e.g.*, *United States* v. *Street*, 529 F.2d 226, 229-230 (6th Cir. 1976). Respondent does not suggest that Colston should have been able successfully to challenge the government's proof of this element of the offense, although he attempted to do so (Gov't Br. 5). The complexity of the second element—the existence of a scheme to defraud—depends on the nature of the particular scheme involved. Here, respondent was charged with check-kiting. This Court described that practice in simple terms in *Williams* v. *United States*, 458 U.S. 279, 281 & n.1 (1982), and the mechanics of such a scheme would not be difficult to grasp for anyone who maintains a checking account. There is, in short, no reason to believe that preparation of *this* mail fraud case was "impossible" within 25 days.[8]

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[8] Respondent asserts for the first time (Resp. Br. 64) that the scheduling of the trial violated his rights under the Speedy Trial Act, 18 U.S.C. 3161(c)(2), which provides that "the trial shall not commence less than thirty days from the date on which the defendant first appears through counsel or expressly waives counsel and elects to proceed pro se." See also NACDL Br. 37-43. Respondent did not raise this objection in either court below or present it in his Brief in Opposition as an alternative ground for affirmance of the judgment below. There accordingly is no reason for this Court to consider it.

In any event, this contention is without merit, as we explain in our opening brief. See Gov't Br. 37 n.26. Respondent's reliance (Resp. Br. 64) on *United States* v. *Daly*, 716 F.2d 1499 (9th Cir. 1983), is misplaced. The court in *Daly* explicitly held that "the 30-day period begins to run when an attorney appears on a defendant's behalf after the indictment or information has been filed" (716 F.2d at 1505), which attorney Levine did here more than four months prior to trial (J.A. 1). The court in *Daly* merely fashioned

d. Respondent also contends that "automatic reversal is appropriate" (Resp. Br. 31) because, in his view, when the district court was apprised of Colston's need for more time, it failed to inquire adequately into the matter or to take appropriate action. See Resp. Br. 31-33, 35. Contrary to respondent's assertion (Resp. Br. 4), however, the district court did not "preemptorily set the trial date" when Colston requested a continuance in order to prepare for trial. The court fully considered the argument by respondent, Colston, and Levine that additional preparation time was needed (J.A. 33-35), and it then *granted* the request for a continuance, "despite the fact the case ha[d] been delayed a great deal" (J.A. 35). The court simply decided to cut the continuance a "few days short" of the 30 days requested in order to fit the case into its schedule (J.A. 35). Neither respondent nor Colston objected to this accommodation, and neither thereafter requested a further continuance on the ground that the 25 days the court originally granted had proven to be insufficient. Nor has respondent even now shown how the difference between the 25 days granted and the 30 days requested was of constitutional dimension. He therefore plainly errs in characterizing the trial court's action as "outrageous" (Resp. Br. 28 n.13).[7]

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an exception for situations in which "there is an indication that the attorney is appearing only for a limited purpose and will not further represent that defendant at trial" (*ibid.*). In this case, there is no indication that Levine's representation was limited. We note as well that Colston actually was appointed to represent respondent on June 12, 1980 (J.A. 3, 24-27, 31), which also was more than 30 days before the July 14 trial date.

[7] This case also is quite different from *Holloway* v. *Arkansas*, 435 U.S. 475 (1978), upon which respondent relies (Resp. Br. 31-32). There, the trial court did not take *any* action—to inquire adequately or to appoint separate counsel—when the attorney representing joint defendants stated that he had a conflict of interest. 435 U.S. at 478-481, 484. As a result, the conflict-of-interest defect was not remedied, and that defect infected the entire proceedings

2. Perhaps recognizing the flaws in the court of appeals' automatic reversal of his conviction without finding specific deficiencies in counsel's performance, respondent argues (Resp. Br. 35, 54-61) that the court of appeals *could have* found such deficiencies and granted relief on that ground. But of course it did not do so, and, as respondent apparently concedes (Resp. Br. 42), most of the alleged errors by counsel upon which respondent now relies were not even raised in the court of appeals. Moreover, because the claim of ineffective assistance of counsel was raised for the first time on appeal, the district court likewise has not made findings or developed a record on that claim.[8] This Court therefore cannot reasonably be expected to consider the scattershot attack respondent now makes on Colston's performance.

We nevertheless will address several of respondent's contentions so that this Court will not be left with the erroneous impression that there is substance to respondent's extravagant assertions that "[a]ctual, specific prej-

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by depriving the defendants of counsel who had undivided loyalty. *Id.* at 485-486, 489-490. Here, by contrast, the trial court did not ignore respondent's concerns, and there is every reason to believe that the continuance the court granted was sufficient to remedy the asserted inadequacy of preparation time.

[8] On March 11, 1981, more than six months after the judgment of conviction was entered, respondent filed a motion for a new trial on the basis of newly discovered evidence. Respondent included in that motion some allegations about counsel's experience and performance. See New Trial Motion at 21-28. These allegations would not appear to be cognizable in a motion for a new trial based on newly discovered evidence. In any event, because the district court denied the motion without reaching the merits (Gov't Br. 7 n.4), the government did not have an opportunity to present evidence in response to the allegations. As a result, although the court of appeals permitted respondent to include his new trial motions as a supplement to the record on appeal (J.A. 7), the material in that motion cannot furnish a basis for decision by this Court or by the court of appeals. Respondent's complaints about his attorney's performance instead should be raised, if at all, in a motion under 28 U.S.C. 2255. See note 17, *infra*.

udice appeared on almost every page of the record" (Resp. Br. 35) and that "gross" failures by counsel "leap from the record" (Resp. Br. 54). On the present record, respondent's speculation, nitpicking, and second-guessing of his attorney's performance serve only to illustrate the mischief that will result if this Court does not require a substantial threshold showing of a fundamental defect in the proceedings in order to obtain relief on a claim of ineffective assistance of counsel.

a. The first of the errors by counsel that respondent says "leap from the record" are that "[c]ounsel neither interviewed nor attempted to interview the prosecution's eighteen witnesses" and "failed to seek and obtain any prior statements of such witnesses made to the government" (Resp. Br. 54). Yet respondent does not cite *any* evidence—from the record or elsewhere—for these bald assertions. What is more, Colston's CJA reimbursement form, included as an appendix to NACDL's Brief, states that Colston devoted *45 hours* to "interviews and conferences." The CJA form does not identify who Colston interviewed or conferred with, but the amount of time devoted to these functions hardly suggests the neglect of the case respondent now seeks to portray. Colston's CJA form further indicates that he devoted 29.6 hours to "obtaining [and] reviewing records." The documents involved are not identified on the CJA form, but the record does establish that Colston was granted access to the Postal Service's extensive investigative file (J.A. 35).[9] We obviously do not ask this Court to resolve any factual issues regarding what Colston actually did to prepare for trial. But a court may not grant relief on the basis of

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[9] We have been informed by the Assistant United States Attorney responsible for the case that these materials contained statements made to investigators by government witnesses; that Colston examined those materials (see also Tr. 423); and that, during a discovery conference, Colston was informed of the details of the anticipated testimony of government witnesses.

an assumption or unsubstantiated assertion that counsel failed to perform certain functions, as respondent urges.

In addition, even if respondent were correct that Colston did not interview certain government witnesses or obtain their prior statements, this alone would not entitle him to relief. Respondent has not shown what information would have been obtained or how it would have been useful at trial. There also were alternative ways by which Colston could learn of the witnesses' anticipated testimony or other evidence. Respondent himself acknowledges that a "[f]ailure to make a thorough extrinsic investigation may be mitigated by the fact that substantial evidence has been obtained from the prosecutors and from the defendant" (Resp. Br. 49; see also *United States* v. *Decoster*, 624 F.2d 196, 209-210 (D.C. Cir.) (en banc) (plurality opinion), cert. denied, 444 U.S. 944 (1979)), and the scope of counsel's investigation also properly may be affected by the "strength of the government's case." *Washington* v. *Strickland*, 693 F.2d 1243, 1253 n.16 (5th Cir. 1982) (en banc), cert. granted, No. 82-1554 (June 6, 1983). See also *United States* v. *Katz*, 425 F.2d 928, 930 (2d Cir. 1970) (Friendly, J.). In these circumstances, the observations of Justice (then Judge) Stevens in response to similar claims are equally apt here:

> Appellants have alleged that their attorney interviewed them for less than an hour, * * * and that he did not produce any evidence or call any witnesses favorable to the defendants. But they have not alleged that any such evidence or witness existed, or was made known to their attorney, or could have been discovered by an investigation. Petitioners have not told us what was said in their conference with counsel. Perhaps, for all we know, they merely explained that they had indeed forged the 35 ballot applications which were placed in evidence by the government and that they were indeed guilty as charged. Surely, if that were the case, counsel had no duty to search for witnesses, expert or otherwise, who might falsely testify to the contrary.

Matthews v. *United States*, 518 F.2d 1245, 1246 (7th Cir. 1975).

Furthermore, even if respondent were able to show that Colston failed to investigate certain matters and that this failure caused his performance to fall below the range of competence expected of defense counsel, it still would be necessary for him to satisfy the second prong of the test for obtaining relief on the basis of ineffective assistance of counsel by showing that prejudice resulted from Colston's omissions. See Gov't Br. App. 7a-10a; U.S. Amicus Br. at 12-18, *Strickland* v. *Washington*, No. 82-1554. As we have explained in our amicus brief (at 18-26) in *Strickland*, this showing of prejudice must be at least equivalent to that required to obtain relief on the basis of the substantive defect in the trial that counsel is alleged to have caused. Where, as here, the asserted defect is that the judgment of conviction was based on less than all the relevant evidence, the defendant who alleges that his attorney caused this defect by failing adequately to investigate and present evidence at trial should be required to make the showing that is universally required in order to obtain a new trial on the basis of newly discovered evidence. Under that test, the defendant must show that the evidence, if available on retrial, probably would result in an acquittal. See also *United States* v. *Decoster*, 624 F.2d at 208 (plurality opinion) ("a likelihood that counsel's inadequacy affected the outcome of the trial").

The soundness of that approach is especially evident in this case. In district court, respondent filed a motion for a new trial based on newly discovered evidence, relying principally on evidence of the Norman bank's foreclosure of the mortgage on the bottling plant (see pages 18-19, *infra*) and that overdrafts represent a legitimate extension of credit. New Trial Motion at 2, 4-21. See note 8, *supra*. In his memorandum in support of that motion (at 3-4), respondent acknowledged that he had to demonstrate that this assertedly new evidence "probably would produce an acquittal." Although respondent argued (*id.* at 4-6) that the distinct "due diligence" element of

the newly discovered evidence test should be relaxed because Colston was incompetent in failing to develop this evidence, he did not argue that he should be excused from showing that the evidence probably would result in an acquittal on retrial. Now respondent has recast essentially the same argument as a claim of ineffective assistance of counsel and argues that a failure to develop a defense based on this evidence is a "substantial" defect that requires reversal *without regard* to the probable effect on the outcome of the trial or indeed without any showing of prejudice at all, except perhaps under a harmless error standard. See Resp. Br. 49. This vividly illustrates how, under the approach urged by respondent herein and the respondent in *Strickland* v. *Washington*, a substantive defect in the proceedings that would not warrant relief in its own right can readily be transformed into a ground for relief simply by claiming that counsel was ineffective in causing the defect.[10]

b. Respondent also plainly errs in contending that there was "manifest incompetence" (Resp. Br. 56) because "[c]ounsel should have proved that writing checks to obtain the benefit of the 'float' and to impress bankers with balances and activity is both common and legitimate" (Resp. Br. 55).[11] Respondent's activities do not at all

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[10] The respondent in *Strickland* v. *Washington* argues (Resp. Br. 62-67) that a test that focuses on the probable effect on the outcome would be inappropriate and speculative and require federal courts to retry questions of guilt and innocence and substitute their judgment for that of state courts and juries. These objections are insubstantial. For more than a century, courts considering motions for a new trial based on newly discovered evidence have assessed the probable impact of new evidence on the verdict. See also U.S. Amicus Br. 23-24. In addition, a federal court would not review such a claim on a petition for habeas corpus until the state court first had evaluated the claim. *Cf. Sumner* v. *Mata*, 455 U.S. 591 (1982). We also fail to see how the policy that federal courts on habeas corpus should respect determinations by state courts and juries would be furthered by a rule under which a state judgment must be set aside even if it is unlikely that counsel's error had any effect on the verdict or sentence.

[11] Respondent also makes much (Resp. Br. 4-5, 28 n.13, 55) of the fact that Colston indicated at the hearing on June 19, 1980

resemble the accepted banking and business practices to which he seeks to compare them.[12] Moreover, although this Court held in *Williams* v. *United States*, 458 U.S. 279 (1982), that check-kiting does not violate the particular federal statute there at issue (18 U.S.C. 1014), the Court plainly did not regard the practice as "legitimate." See 458 U.S. at 287. And, as Justice Marshall observed in dissent in *Williams*, "[t]he Courts of Appeals have been virtually unanimous in holding that check kiting is subject to federal prosecution under the mail and wire fraud statutes, and the majority [in *Williams*] apparently [did] not question these decisions." 458 U.S. at 305 (citations omitted). See, *e.g.*, *United States* v.

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that he would want the help of an accountant but then did not file a motion for that assistance. There is no indication, however, why an accountant's services were not sought. Perhaps Colston and Rivas determined that the assistance of an accountant was not required after all because the case did not prove to be as complex as it initially appeared or because the defense they decided to present—that the check-kiting scheme was the work of Cummings rather than respondent—might have made a detailed examination of that scheme unnecessary or even counterproductive at trial. In any event, respondent has not shown what evidence would have been developed by an accountant.

[12] Although it may be acceptable to obtain a loan from one bank and then borrow from another bank to repay the first loan (see Resp. Br. 55 & n.45), the banks concerned would have made an informed and deliberate decision to extend credit; check-kiting, by contrast, involves exploitation by the borrower of the check collection process without the lender's assent or knowledge. Check-kiting also is fundamentally different from the other practice respondent describes (Resp. Br. 55-56 & n.46), under which some banks or businesses take advantage of the "float" resulting from the collection process in order to retain the use of funds on deposit prior to the time checks drawn on the accounts are presented for payment. Because funds in fact are on deposit in the bank in such a case, the writer of the checks has a reasonable expectation that the checks will be paid when presented. In this case, by contrast, there is no evidence that petitioner believed that there would be sufficient funds in his accounts to cover the checks when presented, except in the form of other checks that were themselves supported by insufficient funds. See note 16, *infra*.

Gross, 416 F.2d 1205, 1212 (8th Cir. 1969) (Blackmun, J.), cert. denied, 397 U.S. 1013 (1970) ("[i]t is established that check kiting is within the reach of the fraud statutes").[13]

Respondent appears to suggest (Resp. Br. 56-57, 59-60 & nn. 49, 50) that this long-settled construction of 18 U.S.C. 1341 has been called into question by the decision in *Williams* v. *United States*. But even if respondent were correct—and there is no indication in *Williams* that he is[14]—this would hardly establish ineffective assistance of counsel at respondent's trial in 1980. Colston could not be found incompetent for not anticipating the holding in *Williams* or for believing an indictment for a check-kiting scheme under 18 U.S.C. 1014 (much less under 18 U.S.C. 1341) "to be as valid as the [four]

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[13] See also *United States* v. *Broxmeyer*, 192 F.2d 230, 232 (2d Cir. 1951); *United States* v. *Foshee*, 578 F.2d 629 (5th Cir. 1978); *United States* v. *Street*, 529 F.2d 226 (6th Cir. 1976); *United States* v. *Bessesen*, 445 F.2d 463, 469 (7th Cir.), cert. denied, 404 U.S. 984 (1971); *Federman* v. *United States*, 36 F.2d 441, 442 (7th Cir.), cert. denied, 281 U.S. 729 (1929); *United States* v. *Young*, 618 F.2d 1281, 1285 (8th Cir. 1980); *Williams* v. *United States*, 278 F.2d 535 (9th Cir. 1960); *United States* v. *Clark*, 456 F.2d 1375, 1377-1378 (10th Cir. 1972); *Deschenes* v. *United States*, 224 F.2d 688, 690 (10th Cir. 1955); *United States* v. *Scott*, 701 F.2d 1340, 1348 (11th Cir. 1983), quoting *United States* v. *Southers*, 583 F.2d 1302, 1308 n.8 (5th Cir. 1978).

[14] In *United States* v. *Frankel*, No. 83-1161 (3d Cir. Nov. 22, 1983), the court held that the rationale of *Williams* applied where the government charged a violation of 18 U.S.C. 1341 that was premised on the theory that the accused obtained money by a false or fraudulent representation in the form of a check supported by insufficient funds. Slip op. 4-5. The court made clear, however, that it was not holding that check-kiting was altogether beyond the reach of 18 U.S.C. 1341—*e.g.*, if the indictment charged a "scheme or artifice to defraud" that did not depend on the theory that an insufficient funds check is itself a false representation. Slip op. 6-10. The indictment in this case incorporated both theories (J.A. 10, 12-23). Accordingly, even assuming that the decision in *Frankel* is correct, it would not follow that respondent was wrongly charged.

dissenters in that case thought [it] to be." *Cooper* v. *Fitzharris*, 586 F.2d 1325, 1334 (9th Cir. 1978) (en banc), cert. denied, 440 U.S. 974 (1979), quoting *McMann* v. *Richardson*, 397 U.S. 759, 773 (1970) (first brackets in *Cooper* opinion).

Consistent with this view, we have argued in our amicus brief (at 26-30) in *Strickland* v. *Washington* that whether an attorney's performance fell materially below the range of competence demanded of defense counsel should be determined, as a threshold matter, by an objective standard. Under that standard, before a court would inquire into counsel's litigating strategy, the defendant would be required to show that the legal right or position he contends counsel should have asserted was clearly established under controlling statutory or case law at the time of counsel's actions. See *Harlow* v. *Fitzgerald*, 457 U.S. 800, 815-819 (1982). Such a rule would provide a remedy for any fundamental unfairness in the proceedings, and yet obviate the need in many cases for a broad-ranging and sensitive inquiry into counsel's handling of the defense, assure some consistency among decisions, respect the constitutionally required independence of defense counsel, and give effect to the presumption on which the adversary system is premised: "that [counsel] was conscious of his duties to his clients and that he sought conscientiously to discharge those duties." *Matthews* v. *United States*, 518 F.2d at 1246 (Stevens, J.). It is clear that respondent is not entitled to relief under this standard. At the time of his trial, controlling precedent in the Tenth Circuit established that check-kiting was unlawful under the mail fraud statute (see *United States* v. *Clark* and *Deschenes* v. *United States*, *supra*) as well as under the "false statement" statute involved in *Williams* (see *United States* v. *Stoddart*, 574 F.2d 1050, 1053 (10th Cir. 1978)).

c. Respondent also contends that Colston was incompetent because he did not present what respondent now terms a "very substantial defense" (Resp. Br. 58); that "there was no fraud and no intent to defraud" (Resp.

Br. 56) because the Norman bank ultimately was not damaged by the check-kiting scheme. He even goes so far as to claim that "[i]f there was a swindler, it was not respondent—it was the Norman Bank" (Resp. Br. 57). See Resp. Br. 56-58, 60. This assertion is frivolous.[15]

Upon discovery by officials of the Norman bank that respondent's activities had resulted in an imbalance of almost $1 million, they persuaded the Tampa bank to freeze the approximately $500,000 it had in Skyproof's account (Tr. 169-170). Respondent promised to reimburse the Norman bank for the remaining $484,000 when confronted by bank officials in October 1975, but he never attempted to make good on that promise (Tr. 172, 180-181). As a result, there was a substantial question for several weeks whether regulatory authorities would close the bank (Tr. 174-175, 192).

In November 1975, without respondent's knowledge, Cummings executed a note to the Norman bank for the amount of the $484,000 overdraft. This note was secured by Skyproof's assets, including the Paris Processing bottling plant. Cummings testified that when respondent learned of this, he was "furious" and told Cummings that she had signed away their "legal ace in the hole" in the event of a lawsuit (Tr. 507-509). The bank examiners required the Norman bank to charge off all but $170,000 of the amount of the note because there was no realistic prospect the remainder would be recovered (Tr. 179-180, 191-192, 437). When respondent then began to siphon off the bottling plant's income, the bank took control of the

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[15] Equally frivolous is respondent's suggestion that Colston was incompetent because he did not argue that the net overdraft was only 4.5% of the total amount of deposits in the Norman and Tampa banks during the six-month period and therefore might have been caused by a "bookkeeping error" (Resp. Br. 57). The net overdraft respondent seeks to minimize totaled $484,000, a figure that could not plausibly be attributed to a "bookkeeping error" by a small business like Skyproof. The fact that it constituted "only" 4.5% of the total deposits is due to the sheer magnitude of respondent's check-kiting scheme, which involved checks bearing a face value of almost $10,000,000 (see Resp. Br. 11).

plant in December 1975. Ultimately, the bank foreclosed on the mortgage, the bottling plant was sold at a sheriff's sale to the bank (the only bidder) for $504,000, and the plant immediately was purchased by two of the bank's directors for a $504,000 promissory note (Tr. 177-179, 207-208, 211-213, 217-218, 440-441). The bank's attorney testified at trial that the bank had not received any payments on this note and that the "prospects of it seeing any cash in the full amount of what it's been out are very slim" (Tr. 218).

Thus, there is no basis in the record for the contention that the Norman bank ultimately recovered the amount of the overdraft, except in the form of the promissory note from its directors. But even if everyone (including the directors who sought to bail out the bank) ultimately had been reimbursed by respondent, this would not negate the existence of a violation of 18 U.S.C. 1341. The mail fraud statute requires only the existence of a scheme to defraud (*Pereira* v. *United States*, 347 U.S. at 8); it does not require that the scheme be successful. See, *e.g.*, *United States* v. *Goss*, 650 F.2d 1336, 1342 (5th Cir. 1981); *United States* v. *Gross*, 416 F.2d at 1209; *Williams* v. *United States*, 278 F.2d 535 (9th Cir. 1960). In some circumstances, reimbursement may constitute evidence of an absence of fraudulent intent at the time of the overdrafts. *United States* v. *Foshee*, 578 F.2d at 633-634. But there was no evidence here that the bank received full payment from Skyproof, much less that respondent voluntarily directed reimbursement in a manner that could suggest good faith. Compare *United States* v. *Constant*, 501 F.2d 1284, 1289 (5th Cir. 1974); cf. *United States* v. *Bailey*, 444 U.S. 394, 411-417 (1980).[16] Accordingly, Colston

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[16] Respondent also errs in contending (Resp. Br. 60 n.50) that a violation of 18 U.S.C. 1341 requires a showing of an intent permanently to deprive the bank of funds. It is sufficient, in the Tenth Circuit as elsewhere, that the defendant knew that there would be insufficient funds in the account to pay the checks when presented in the normal course of business, other than by the deposit in rapid

cannot be thought to have been incompetent for attempting to place the entire responsibility for Skyproof and its checking accounts on Cummings, rather than conceding that respondent was responsible for both but maintaining that he lacked fraudulent intent, as respondent now argues. Compare New Trial Motion at 11-21. In this respect, as in the others discussed above, respondent's speculative assertions and second-guessing of trial counsel's strategy and conduct do not, on the present record, raise even a colorable claim of ineffective assistance of counsel.

For the foregoing reasons and the additional reasons stated in our opening brief, it is respectfully submitted that the judgment of the court of appeals should be reversed.[17]

REX E. LEE
Solicitor General

DECEMBER 1983

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succession of other checks that the defendant knew or had reason to know were not supported by sufficient funds. See, *e.g.*, *United States* v. *Clark*, 456 F.2d at 1378; *Deschenes* v. *United States*, 224 F.2d at 690; *United States* v. *Bessesen*, 445 F.2d at 469; *Williams* v. *United States*, 278 F.2d at 537-538; *Reasonable Expectation of Payment as Affecting Offense under "Worthless Check" Statutes*, Annot., 9 A.L.R. 3d 719, 721, 725 (1966).

[17] Because the ineffective assistance of counsel issue was not addressed by the district court and was raised for the first time on appeal, the case should not, contrary to respondent's suggestion (Resp. Br. 61-65), be remanded to the court of appeals for consideration of respondent's particularized attack on Colston's actual performance. Those claims, to the extent they have any merit, can be addressed in a proceeding under 28 U.S.C. 2255. See Gov't Br. 40-41 n.30.

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No. 82-660

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

UNITED STATES OF AMERICA,

Petitioner,

v.

HARRISON P. CRONIC,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE AS AMICI CURIAE ON BEHALF OF RESPONDENT

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QUESTION PRESENTED

Whether the court of appeals correctly reversed respondent's convictions on the ground that he did not receive effective assistance of counsel at trial, without identifying any act or omission by counsel that departed substantially from what a reasonably competent criminal defense attorney would have done under the circumstances and without finding any prejudice to respondent?

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INTEREST OF AMICI CURIAE

National Association of Criminal Defense Lawyers (NACDL)

The National Association of Criminal Defense Lawyers, Inc. (NACDL) is a District of Columbia, nonprofit corporation whose membership is comprised of approximately 2,700 lawyers who are citizens of every state and reflect the diversity of state and federal criminal practice. The membership consists of trial and appellate advocates, law professors, and judges who are concerned with ensuring quality defense representation that fairly effectuates the adversary system.

California Attorneys for Criminal Justice

The California Attorneys for Criminal Justice (CACJ) is a California statewide organization of 2,000 attorneys with substantial experience as appointed defense counsel, law professors, and law students interested in improving the quality of

defense advocacy. CACJ seeks the preservation of constitutional and legal rights of all citizens with special emphasis on the role of defense counsel in the criminal process and regularly sponsors defense advocacy training. CACJ has questioned the developing practice of countries to "auction" indigent criminal defendants to lawyer groups who submit the lowest bid with little concern for the quality of defense representation. CACJ seeks recognition that more than a license to practice law is necessary to handle a serious criminal case.

Amici's Common Concern

Unskilled practitioners conscripted by trial courts to serve as appointed counsel who have neither the requisite qualifications nor experience damage and injure the reputation of the defense bar, undermine the fairness of the proceedings that depends upon skilled, prepared, and

independent advocates to preserve the interest of the defendants, and compromise a judicial system inherently dependent upon a fully presented controversy. Experienced criminal defense lawyers are embarrassed by the unqualified attorneys who readily accept appointed criminal cases to please the court, gain trial experience, or earn the often nominal compensation.

Courtroom experience can be acquired after specialized training, and such novices should first be assigned to cases without imprisonment (i.e., infractions or regulatory offenses). The use of attorneys "off the alphabetical list" may insure random rotation of assignments but in not matching the skills of the lawyer to the complexity of the case abrogates the requirements of fundamental fairness, the Sixth Amendment, and the Criminal Justice Act of 1964 (CJA), as amended (18

U.S.C. § 3006A).[1] Too often some jurists and bar leaders complain to the public of the decline of trial advocacy, but have hesitated to address the issue in the context of a criminal appeal.[2] Congress has required the court of appeals and the district court to establish panels of qualified attorneys to accept such appointments. When derelictions are found, many are overlooked because of the burden of a retrial.

[1]H.R. 3233 introduced in Congress on which recent hearings have been held seeks to increase the CJA rates of compensation for appointed counsel in criminal cases. NACDL and CACJ support this effort, although the rate of compensation will not necessarily improve the quality of representation. "The availability of compensation and other resources can be of great significance in improving the quality of representation, but it does not guarantee it." Oaks Report on the CJA, Amendments to the CJA of 1964: Hearings on S. 1461 Before the Subcomm. on Constitutional Rights of the Senate Committee on the Judiciary, 91st Cong., 1st Sess. 274 (1969).

[2]Reversal of trials because of ineffectiveness of counsel is a "bitter pill" for judges especially if such action might sully the reputation of a conscripted lawyer. See Baselon, The Realities of Gideon and Argersinger, 64 Geo. L.J. 811, 821-23 (1976); Baselon, The Defective Assistance of Counsel, 42 U. Cin. L. Rev. 11, 20-30 (1973).

SUMMARY OF THE FACTS

In February 1980, the respondent with two co-defendants was charged in a 13-count indictment with using the mails for a "scheme and artifice" to defraud by "floating" a series of insufficient checks through a series of banks in Tampa, Florida, Chicago, Illinois, and Norman and Oklahoma City, Oklahoma. The 15-page indictment alleged a series of transactions occurring from March through October 1975 and specified 45 checks in the enumerated counts charging violations of 18 U.S.C. § 1341 and § 2. The respondent was alleged to have directed the cashing of checks by co-defendant Cummings, and the amount of checks within the scheme from the period 23 June 1975 to 16 October 1975 amounted to $4,841,073.95. (Indictment)

The respondent was initially represented by attorney Arnold D. Levine who

had also represented the co-defendant Cummings as well as giving legal assistance to the corporation Skyproof Manufacturing. On 22 February 1980 at the arraignment, the "dft obj to less than 30 days before trial purs to Speedy Trial Act."[3] On 23 May 1980, jury trial was set for 16 June 1980.[4]

On 5 June 1980, Mr. Levine, because of the patent conflict of interest, moved to withdraw, and on 19 June 1980 the motion was granted and Chris Colston was appointed defense counsel under the CJA. (R.T. 14)[5] Respondent objected:

> One is I don't feel like that I could possibly get a fair defense giving my attorney one or two weeks to prepare for this when Mr. Levine has had the advantage of a five-year investigation, all the documentations, a complete review of all that prior to my

[3]Docket Entries, p. 1.

[4]Docket Entries, p. 2.

[5]The Reporter's Transcript of the proceedings on 19 June 1980 (Volume VII) is referred to as "R.T."

testimony before a federal grand jury in Tampa. (R.T. 15)

The court expressed its concern for adhering to its trial date of 30 June and acknowledged that he was unacquainted with counsel appointed "off the alphabetical list" (R.T. 18), but that appointed counsel[6] on behalf of his client, expressly requested a minimum 30-day continuance (R.T. 19). Attorney Levine, a former federal prosecutor, explained the need for a minimum 30-day defense preparation:

> If I may be of some assistance to the Court, since I have been in the case for a good while and Counsel's just coming in, the documentation that the government has and has made available for examination, literally speaking, is at least a foot and a half high if not two feet high, that is the government's documentation in this case. And Counsel for Mr. Cronic has not as yet had an opportunity to see it no less digest it. It constitutes hundreds and hundreds of checks and thousands of entries and some of the witnesses in the matter are witnesses from Florida, from the Tampa community and some witnesses are local here.

[6]All references are to Mr. Colston.

> I would respectfully submit to your Honor that if counsel for Mr. Cronic were to devote all of his working days, he might be able to be ready in thirty days, might be, if he were to devote all of his time just to this case. (R.T. 18)

The court denied the requested continuance and set the trial date for 14 July 1980 (R.T. 19).

Appointed counsel inquired of the court of hiring "an investigative assistant" (R.T. 21) and "my most pressing assistance needed right now would be of an accountant." (R.T. 22) The court stated that it would not hesitate to grant the request but added:

> Unfortunately, as you may not know, Mr. Levine likely does, $300 is the most we can pay and that doesn't get much accounting but it is better than none, I guess.

(R.T. 22) The record does not reflect that appointed counsel obtained the services of an investigative assistant or

accountant.[7] The respondent questioned the appointment of counsel because of his specialty as real estate law and that he had only one federal criminal case in his entire legal experience, the court interpreted the objection as the right to select one's own lawyer and denied the objection of the respondent to his appointed attorney's qualifications. (R.T. 23).

On 19 June 1980, the trial judge appointed Ryland L. Rivas as an "investigator"[8] to interview witnesses and examine

[7]No CJA Form 21 (request for non-attorney services) was filed other than for Ryland L. Rivas, as "investigator" and for the court reporter's transcript. Judical notice is requested for the three CJA vouchers filed in the district court file which are Appendix A to this brief. Fed. R. Evid. 201(f).

[8]Guidelines for the Administration of the Criminal Justice Act, § 2.11 generally prohibits compensation of more than one counsel unless it is an extremely difficult case and the court makes a finding it is in the interest of justice. No such finding was made, and the record contains no explanation for the subterfuge other than to "end run" the requirements of the CJA.

documents. The rate of compensation on the work performed is not listed, but a claim for $300 was approved.

The Trial

The four-day jury commenced on 14 July 1980. Attorney Ryland L. Rivas was present to assist Colston. The government presented 18 witnesses and 125 exhibits; the defense presented 7 exhibits but no defense. The government outlined a "check kiting scheme" in 1975 involving a series of transactions of over $5 million in insufficient checks. In the defense opening, appointed counsel stated "the government's alleged a conspiracy between three defendants. They say this conspiracy was to defraud banks." (J.T. 87)[9] (emphasis added). After promising to prove that the client would be able to cover the overdrafts, the greed or incom-

[9]The transcript of the jury trial is referred to as "J.T." Counsel in his opening twice again refers to "conspiracy." (J.T. 91)

petence of the Norman Bank of Commerce, and Skyproof's "shambles of a record system," he additionally outlined that the proof would show that the defendant had no connection with the ownership of Skyproof, did not assign or control the bank accounts, and did not control Ms. Cummings. (J.T. 87-89) Counsel concluded:

> I appreciate your attention. I apologize if I had to read from notes, but this is my first trial and I hope you will just bear with me.

(J.T. 92)

Throughout the trial defense counsel made nine perfunctory objections (J.T. 100 (best evidence), 114 (foundation), 137 (not seen documents), 190 (non-responsive), 194 (non-responsive), 348 (knowledge), 376 (anticipated objection), 378 (handwriting identification), and 436 (purported loss)). Attorney Rivas objected to the introduction of worksheets

but not their use or marking for identification (J.T. 302). Later he commented "Excuse me, Your Honor, our witnesses are coming in." (J.T. 463) Finally, Mr. Rivas acknowledged receipt of a government requested instruction not given (J.T. 599).

On appointed counsel's third objection to Government Exhibit 1-A,B,C, appointed counsel stated, "Yes, Your Honor, we would object because we have no idea what is to be in these." The prosecutor responded, "We made those available to everyone . . . ." (J.T. 137) Appointed counsel asked co-defendant Merritt who was testifying for the government, "The government has alleged a conspiracy in this case, has it not?" When the witness was not sure, counsel asked, "Have you ever been furnished a copy of the indictment?" Merritt, the non-attorney, answered, "Yes, sir, I have, but I do

not recall the words or term conspiracy." (J.T. 426) Shortly thereafter, the judge admonished the jury as to appointed counsel's misunderstanding of the charge for the court stated, "Just one thing. Inadvertently counsel referred to conspiracy. The offense charged is not a true conspiracy, it's close kinfolks to it, but, it is alleged that a scheme and artifice to defraud was in existence and the mails were used in carrying it out. (J.T. 430)

The government's last witness was the Postal Service accountant who put the case together for the government with charts, use of losses, and the checks used for personal expenses of the respondent and the co-defendant Cummings. (J.T. 557-566) There was no cross-examination, and the government rested. (J.T. 566) On the following morning after an off-the-record chambers conference, the court announced

that the defendant had made a motion to dismiss the indictment "on the failure of proof," and the defense rested and did not call any witnesses. (J.T. 567)

Appointed counsel's closing argument was brief. (J.T. 581-590) During closing he stated, "Now, in the indictment, the government has alleged a scheme. When I got into this case three or four weeks ago, I did not think there was any scheme whatsoever. Now I do." (J.T. 582) "I agree there's some scheme there." (J.T. 583)

The defendant was found guilty on eleven of the thirteen counts[10] and was later sentenced to 25 years imprisonment.

Appointed counsel submitted a CJA Form 20 for compensation and reimbursement and was awarded by the court $1,097.60 (see Appendix A-1). Counsel detailed his

[10]The two counts on which the defendant was found not guilty related to the checks of the co-defendant Merritt who was given immunity.

hours for services. He had spent 39.8 hours in-court time (withdrawal hearing 3.2, trial 32, and sentencing 1.6) and 92.6 hours out-of-court. Appointed counsel spent only 29.6 hours obtaining and reviewing records and 45 hours interviewing witnesses. On "restitution negotiations" counsel spent 12.5 hours and 5.5 hours perfecting the appeal.[11] Counsel never obtained any investigative services other than Mr. Rivas or the "pressing" accounting assistance. (R.T. 22)

ARGUMENT

THE STANDARD USED BY THE COURT OF APPEALS TO MEASURE THE EFFECTIVE ASSISTANCE OF COUNSEL REQUIRED UNDER THE SIXTH AMENDMENT WAS REASONABLE AND PROPER IN THE CONTEXT OF THIS CASE.

The test of the Tenth Circuit in determining inadequacy of representation

[11]The CJA form appears to be an accurate total of all of appointed counsel's services, for the time spent would have entitled him to compensation to $3,046 if the district judge and the chief judge of the circuit would have waived the $1,000 statutory limit. 18 U.S.C. § 3006A(d)(3). The form reflects the hours counsel would not get paid for.

without the proof of specific prejudice includes "(1) the time afforded for investigation and preparation; (2) the experience of counsel; (3) the gravity of the charge; (4) the complexity of possible defenses; and (5) the accessibility of witnesses to counsel." United States v. Cronic, 675 F.2d 1126, 1129 (10th Cir. 1982). That standard applied to this case fairly implements the right to counsel granted by the Sixth Amendment and the CJA.

Defense counsel may make tactical missteps and errors of judgment, and in some cases they may be harmless beyond a reasonable doubt. Error of counsel is not always incompetency. That counsel does exercise judgment should not insulate from review his or her qualifications and performance. In fact, much of the most important work of counsel outside the courtroom is seldom within the four

corners of the record, and by insisting upon higher standards for counsel this Court would materially decrease the post-conviction hearings on the performance of admittedly substandard lawyers. Harmless error should not be made a shield for the inadequate lawyer.

In this case, the Court has a two-part analysis: (1) qualifications of appointed counsel and (2) his preparation and trial performance. Then adequacy of counsel is measured first against the CJA, a statute, then against the Sixth Amendment right to counsel. Whether qualifications or performance, against the CJA or the Sixth Amendment, counsel's performance fell below the bar's reasonably trained and experienced criminal defense advocate in this multiple fraud case.

The Tenth Circuit standard enumerates criteria that must be adapted to individual cases, and relief is limited only to

the most egregious cases. The enumeration first of minimum qualifications and then performance standards is difficult, but this real estate lawyer without criminal law experience or even a jury trial should not have been appointed in a complex mail fraud. In its constitutional role this Court should be slow to issue "black letter" standards about what this Court believes is the reasonably experienced criminal defense lawyer, but the standards should be announced that do not tacitly encourage less than marginal performance because good defense lawyers will not take these cases.

Justice Erickson, an experienced appellate jurist with an understanding of the realities of trial practice, especially criminal trial practice, urges the use of the American Bar Association Standards Relating to the Defense

Function.[12] In this case, appointed counsel, principally due to inexperience, transgressed several of the standards: 3.1, Lawyer-Client Relationship;[13] 3.2, Interview Client;[14] 3.6, Prompt Action;[15] 3.8, Keeping the Client Informed; 3.9, Same Duty as For Retained Client;[16] 4.1,

[12]Erickson, Standards of Competency for Defense Counsel in a Criminal Case, 17 Am. Crim. L. Rev. 233 (1979).

[13]"Defense counsel should seek to establish a relationship of trust and confidence with the accused." In Morris v. Slappy, 103 S. Ct. 1610 (1983), the Court questioned the right of the defendant to a "meaningful relationship" with appointed counsel, but it is understood that the attorney still has the minimum obigation to seek to establish trust and confidence on a professional rather than personal basis.

[14]The inconsistent actions taken during trial does not indicate substantial client contact which may have been influenced by the distance between the defendant who lived in Florida and appointed counsel who was in Oklahoma.

[15]In July 1980, counsel was appointed less than a month before trial but the offenses allegedly occurred in 1975.

[16]The trial court placed too much emphasis on the public obligation of appointed counsel to accept the duty (to the court) rather than the individual relationship to the client the same as if that client had retained the appointed attorney. Cf. Farri v. Ackermann, 444 U.S. 193 (1979).

Duty to Investigate;[17] 4.3, Relationship with Prospective Witnesses;[18] 4.4, Relationship with Expert Witnesses;[19] 4.5, Good Faith Use of Discovery;[20] 5.1, Advising the Client and the Duty of a Candid Evaluation;[21] 6.1, Duty to Explore

[17]Attorney Levine revealed the impossible task of preparation given the government's extended investigation, and his substantial experience as a federal criminal law practitioner was probably conservative for a person without trial or criminal law experience. "Investigator Ryland" should not be considered an investigator.

[18]The failure to call any witnesses in light of the opening statement is suspect. The appointed "investigator's" remark that witnesses were coming was either a misunderstanding or misstatement.

[19]The failure to obtain either an investigative assistant or an accountant, even though misleading advice was provided by the trial judge on the availability of experts under the Criminal Justice Act, see infra.

[20]Although the prosecution apparently made the voluminous discovery available, counsel had not yet mastered it.

[21]One of the most difficult duties for defense counsel is to provide the client with a candid view of the government's charges and evidence, as well as an opinion as to the outcome of the litigation, even if the client might not agree. This candid and professional evaluation depends upon the mastery of the materials in the case as well as the experience of counsel in understanding the probable outcome in light of similar cases.

Disposition without Trial.[22]

No single formula will evaluate competency. In this case, the lack of time to effectively prepare was paramount to the determination that counsel's services would not be effective.[23] Outstanding counsel without adequate investigation and preparation would be ineffective--though not incompetent. On the other hand, counsel without substantial knowledge of the criminal law, especially federal criminal law when before a federal court, might still provide ineffective assistance no matter how much preparation.

The standard for the effective assistance of counsel could vary from an

[22]Although such action can only be taken with the client's consent, if there is adequate time prior to trial and counsel has sufficient mastery of the case, the exploration and consideration of a disposition is essential to provide effective assistance of counsel. Both co-defendants so resolved their charges.

[23]Old trial lawyers agonizingly repeat that the most essential element of good advocacy is complete and thorough preparation. The five "P's" are: Prior Preparation Prevents Poor Performance.

ever increasing detailed checklist or a more convenient but ambiguous generalized standard: "the skill, judgment and diligence of a reasonably competent defense attorney." Before performance is reviewed the court must evaluate the qualifications of counsel against some minimum standard. Something more than a license to practice is necessary for a case where the client will probably be imprisoned. This Court need not fashion a "bright line" standard other than to acknowledge that counsel without jury trial experience or federal criminal law experience did not satisfy the minimum standard.

Before appointed counsel served in a federal felony criminal case counsel could be expected to undergo training and participate in two or more criminal jury trials or equivalent experiences.[24] The Judicial

[24]This requirement for panel attorneys now exists in the Southern District of California.

Conference's Devitt-King Committee Reports have initiated experiments with general proposed standards of admission to federal courts,[25] but anomalously the federal courts have failed to adopt standards for CJA panel attorneys. Much as a trial court has a responsibility to inquire as to the mental responsibility of an accused to stand trial,[26] the trial court must make a minimum inquiry into the skill, qualification, ability, training and experience of those who serve as appointed counsel in felony cases.

[25]Burger, Some Further Reflections on the Problem of Adequacy of Trial Counsel, 49 Fordham L. Rev. 1 (1980). A former federal district judge stated, "If advocates are meaningfully incompetent, how can we leave their clients in jail? If the incompetence is not sufficient to invalidate judgments, how large a concern is it? If we are not being hypocritical in allowing the convictions to stand, are we distorting when we charge that lawyers bumble on a large scale?" Frankel, Curing Lawyers' Incompetence: Primun Non Nocere, 10 Creighton L. Rev. 613, 620 (1977).

[26]Pate v. Robinson, 383 U.S. 375 (1966); Drope v. Missouri, 420 U.S. 162 (1975).

In some federal districts, there is a practice of requiring counsel to work first on petty offenses or misdemeanors, or as counsel appointed for material witnesses, then later an appointment in a "low yield" felony (anticipated incarceration would not exceed one year in most cases).[27] Although an accused may not have a right to select counsel,[28] the court has a duty to insure that the skill and experience of counsel matches the case. The Tenth Circuit correctly

[27]The Northern District of Illinois, a pilot district under the King plan, has an excellent training program for CJA panel attorneys supervised by the Federal Defender Terence F. MacCarthy and is described in the Amendments to CJA of 1964: Hearings on S. 1461 before the Subcomm. on Constitutional Rights of the Senate Committee on the Judiciary, 91st Cong., 1st Sess. 121-27 (1969) (statement of Federal Defender MacCarthy).

[28]If possible the client should be given some limited choice of counsel. For example, the client might be permitted to request a different attorney from the same defender office or be given a choice between a federal defender and a CJA panel attorney. The problem now before the Court might have been avoided if another CJA panel lawyer had been selected.

assessed adequacy of counsel in the threshold question of minimum qualifications: "(2) the experience of counsel; (3) the gravity of the charge; [and] (4) the complexity of possible defenses."

Additionally, the Tenth Circuit's standard implements Powell v. Alabama's[29] requirement of adequate preparation and investigation. The Tenth Circuit's criteria: "(1) the time afforded for investigation and preparation; and (5) the accessibility of witnesses to counsel," dealt with the opportunity to prepare. This complex mail fraud case with volumes of discovery that an experienced defense lawyer would require full-time one month to study, analyze, verify, organize, critique, and synthesize, was brought to

[29]287 U.S. 45 (1932).

trial within 24 days.[30] This scheduling of the trial could only telegraph to the traumatized tyro that such performance of counsel would be perfunctory or at least a learning experience. Appointed counsel had difficulty understanding the difference between a "scheme and fraud" and a conspiracy for which the judge had to correct as an "inadvertence." The government's four-and-a-half year time of preparation literally bowled over the inexperienced defense counsel at trial.[31] The defense asked for an investigative assistant and accountant, but never

[30]The court of appeals referred to 25 days to prepare. 675 P.2d 1126, 1129. Appointed counsel took over on the day retained counsel was allowed to withdraw (19 June 1980), and trial started on 14 July 1980. More accurately, appointed counsel had less than 24 days to prepare. Cf. Fed. R. Crim. P. 45(a).

[31]Defendant's "kind words" about defense counsel's performance (J.T. 568) are probably deference to the court who appointed such inexperienced counsel and could not rationally be treated as a "knowing and intelligent" waiver of competent counsel. Cf. Von Moltke v. Gillies, 332 U.S. 708 (1948); Carnley v. Cochran, 369 U.S. 506 (1962).

followed up on this initial request. The government's case turned on accounting practices, the "float" between banks, and the processing of these checks and their relationship to Skyproof. Counsel was in need of expert financial assistance on bank procedures, accounting practice, check routing and cashing, and value assessments of the companies' worth to at least evaluate the evidence and formulate some consistent theory of defense. The use of the mails jurisdictional nexus was not properly challenged, and the evidence concerning the banking practices, the loans, and the operation of Skyproof never fairly developed or challenged the evidence of loss or the difficult issue of mens rea for this offense.

The failure to present any defense whatsoever reflects the unsettled closing argument where counsel conceded the existence of the scheme to defraud. That

Ms. Cummings was her own person and not subject to the direction of the respondent was never established by any defense evidence. No evidence was offered on the true value of the bottling company that was sold for the indebtedness created by the checks. No evidence was offered to show that the checks were expended for the benefit of Skyproof. In light of the professionally and carefully marshalled evidence of a skilled and experienced prosecutor, the defense collapsed. The failure to live up to promises made in the opening statement was disastrous. In addition to a review of the government's discovery, independent investigation would have had to be done to size up the credibility of the witnesses, the strength and weaknesses of their expected testimony, and their weaknesses to cross-examination. If possible, a professional assessment should have been done to integrate the

facts into some arguable challenge to the voluminous detail of the government's case.

Goliath's triumph was an empty victory for the fairness of the adversary system. The court of appeals accurately observed: "Nevertheless, Cronic's case was not an ideal one for an aspiring criminal defense lawyer to cut his teeth on." 675 F.2d 1126, 1129.

In Powell v. Alabama, the defendants were indicted six days after the alleged rape, and six days later they went to trial. The factual dispute, although greatly contested, turned on the reportedly recent observations of the witnesses to a one-time occurrence--a factual dispute that would depend upon the credibility of the two alleged victims. The state trial court in Powell had originally appointed all members of the bar but later allowed a Tennessee lawyer named Mr.

Roddy who was appearing without compensation on behalf of the defendants. The Hon. Milo Moody, "an able member of the local bar of long and successful experience in the trial of criminal as well as civil cases," 287 U.S. 45, 75, assisted Mr. Roddy and was willing to go ahead and help him in anything he could do. Mr. Rivas' role is akin to that of Mr. Moody. Mr. Rivas' minimal and secondary participation does not cure the ineffectiveness of principal counsel.[32]

This Court in Powell found the designation of associate counsel to be both indefinite and so close upon trial so

[32]Mr. Rivas indicates some criminal experience but it is not known whether it is in the federal court and his role in this trial was extremely attenuated. "Standby counsel" is provided in some cases where the defendant acts as his own lawyer but was not intended to include cases where counsel had already been appointed. The use of counsel as "second chair," thoroughly briefed on the facts, law, and tactics of the case, is an excellent practice for the qualified tyro who takes his or her first steps in minor litigation.

as to be pro forma.[33] This was not substantial and effective legal assistance. This Court noted the need for an opportunity to prepare:

> In any event, the circumstance lends emphasis to the conclusion that during perhaps the most critical period of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thoroughgoing investigation, and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself.

287 U.S. 45, 57.

In Avery v. State of Alabama, 308 U.S. 444, 446 (1940), this Court reiterated the need for preparation by defense counsel to implement the Sixth Amendment:

> But the denial of opportunity for appointed counsel to confer, to consult with the accused and to prepare his defense, could convert the appointment of counsel into a sham and nothing more than a formal com-

[33]The dissent of Justice Butler challenged that participation of the Hon. Milo Moody was pro forma. 287 U.S. 45, 74-75.

> pliance with the Constitution's requirement that an accused be given the assistance of counsel. The Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment.

In Chambers v. Maroney, 399 U.S. 42 (1970), the petitioner had been denied a hearing in a habeas corpus proceeding which challenged the effective assistance of counsel. The defendant's first trial in that case ended in a mistrial, and prior to the commencement of the second trial the defendant was represented by a different attorney from the same defender office. No charge was made that the second attorney was either incompetent or inexperienced. This Court exhorted state courts to make every effort to effect early appointments of counsel in all cases, but was not inclined to reverse because of a tardy appointment of counsel. Whether or not the appointment was shown to be tardy when there was a "preview"

with the first trial in which counsel of the same defender office provided representation is not analogous to an inexperienced lawyer faced with a strange and complex criminal case. Similarly, Morris v. Slappy, 103 S. Ct. 1610 (1983), may be distinguished because the second deputy public defender was experienced, prepared, and maintained the continuity of the defense. The first public defender was absent and unavailable through sickness, and the replacement counsel who had sufficient time to prepare for trial made no request for a continuance. In this case, the respondent not only objected to inexperienced or unqualified counsel, but appointed counsel expressly requested a minimum of a 30-day continuance which was pressed more assiduously with greater explanation by former retained counsel who was familiar with the case and had filed extensive motions. The request for more

time by defense counsel distinguishes both Chambers and Morris.

United States v. Morrison, 449 U.S. 361 (1981), is an anomaly. It is not valid precedent for the rule that inexperienced or unprepared defense counsel's lack of preparation and nonperformance in a serious federal felony can be characterized a "judgment call" that may be treated as harmless error. Two DEA agents suggested that an accused represented by retained counsel ($200 retainer) could get better representation by the public defender and indicated the value of cooperation and avoidance of jail. She rejected their overtures, and the defense contended that the quality or effectiveness of representation had been prejudiced. The district court had dismissed the indictment because of the egregious behavior of the agents. This Court reversed absent demonstrable prejudice or

substantial threat thereof, for dismissal of the indictment was inappropriate. The Court did note that remedies should be tailored to the injury suffered, and reversal is appropriate where there has been ineffective counsel. The Court cited Powell v. Alabama, as an example of relief where "judicial action before or during trial prevented by counsel from being fully effective." 449 U.S. 361, 364.

When a conflict has been demonstrated, this Court will reverse without a showing of prejudice. Glasser v. United States, 315 U.S. 60, 76 (1942);[34] Holloway

[34]"The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."

v. Arkansas, 435 U.S. 475, 491 (1978).[35]

In determining the relief to grant, Geders v. United States, 425 U.S. 80 (1976), offers guidance. There, this Court reversed a federal conviction as the result of a ten-day trial because the trial court precluded counsel from consulting his client the defendant during a seventeen-hour overnight recess. Although the trial judge had a right to control his courtroom (as well as his calendar), "convenience occasionally must yield to concern for the integrity of the trial

[35] "Thus an inquiry into a claim of harmless error here would require, unlike most cases, unguided speculation." In Cuyler v. Sullivan, 446 U.S. 335 (1980), the Court held that the "mere possibility" of a conflict of interest did not warrant the conclusion that the defendant was deprived of his right to counsel. The Court also noted "our decisions make clear that inadequate assistance does not satisfy the Sixth Amendment right to counsel made applicable to the States through the Fourteenth Amendment . . . . Thus, the Sixth Amendment does more than require the States to appoint counsel for indigent defendants. The right to counsel prevents the States from conducting trials at which persons who face incarceration must defend themselves without adequate legal assistance." 446 U.S. 335, 344.

itself." 425 U.S. 80, 91.

When the court appoints inexperienced counsel for a complex and multi-incident mail fraud case and forces the case to trial in which even an experienced counsel would be unable to prepare, prejudice need not be shown. The "unguided speculation" of calling the error harmless would negate the existence of the right.

THE DISTRICT COURT FORCING THE DEFENDANT TO TRIAL OVER DEFENSE COUNSEL'S REQUEST FOR A THIRTY-DAY CONTINUANCE VIOLATED THE SPEEDY TRIAL ACT (18 U.S.C. § 3161(c)(2))

In 1979 Congress was unequivocal in establishing the minimum defense preparation time necessary in a federal criminal case. This minimum "safety valve" was established to offset the hydraulic pressures of moving cases announced with the adoption of the Speedy Trial Act (18

U.S.C. §§ 3161, et seq.).[36] Section 3161(c)(2) provides:

> Unless the defendant consents in writing to the contrary, the trial shall not commence less than thirty days from the date on which the defendant first appears through counsel or expressly waives counsel and elects to proceed pro se.

In United States v. Mers, 701 F.2d 1321, 1332-33 (11th Cir. 1983), the court held:

> The legislative history leaves no doubt that the purpose behind subsection (c)(2) was to prevent the trial from being held so quickly that a defendant would not have time to prepare. Section 3162(c)(2) was added to the statute at the behest of the Justice Department, the Judicial Conference and the American Bar Association.

For the Department of Justice, Attorney General Griffin B. Bell, in a letter dated 10 April 1979 to the Vice President stated:

[36] Although the sanction provisions of 18 U.S.C. § 3162 were delayed until 1 July 1980 (18 U.S.C. § 3163) the other provisions including section 3161(c)(2) became effective 2 Aug. 1979. Speedy Trial Act Amendments of 1979, Pub. L. 96-43, 93 Stat. 327 (2 Aug. 1979).

> Second, the trial cannot be scheduled sooner than 30 days after the filing of an information or indictment, without the consent of the defendant, thus assuring sufficient time for the selection of counsel of choice and preparation of defenses.[37]

The position of the Judicial Conference of the United States was articulated by William E. Foley, Director, Administrative Office of the U.S. Courts, to Senator Kennedy, Chairman, Committee on the Judiciary, in his letter dated 20 April 1979:

> Second, it would add a new provision that a defendant may not be compelled to go to trial in less than thirty days from the beginning date from this time limit (indictment or initial appearance in the district, whichever comes later).[38]

The American Bar Association's position was reviewed during these Congressional hearings, and the ABA concurred with the Department of Justice:

[37] The Speedy Trial Amendments of 1979: Hearings Before the Senate Committee on the Judiciary on S. 961 and 1028, 96 Cong. 1st Sess. 729 (1979).

[38] Ibid. at 733.

> It is recommended that the Speedy Trial Act be amended to provide that the trial of a defendant shall not commence within 30 days of the filing of indictment or information without the defendant's consent. The Department of Justice bill includes that recommendation. The restriction on the minimum time that a judge will allow a defendant to prepare is of particular importance when the defendant was not arrested or charged before the indictment. With the increasing emphasis by federal law enforcement agencies on white collar crime this is of growing importance. It also serves to protect a defendant's right to choose counsel of the defense choosing by giving minimal opportunity to retained counsel and prepare for trial.[39]

Retained counsel Arnold Levine, who initially represented the defendant and the co-defendant, had a patent conflict of interest as well as the potential for being called as a witness at trial. The district court only after an evidentiary hearing permitted him to withdraw on 19 June 1980 at which time the court appointed counsel for the respondent who had demonstrated he was financially unable

[39] Ibid. at 492.

to retain counsel. Since representation by Mr. Levine with a patent conflict of interest was a nullity under established precedent of this Court, Glasser v. United States, 315 U.S. 60 (1942), and Holloway v. Arkansas, 435 U.S. 475 (1978), the defendant had not truly appeared "through counsel." Mr. Levine's representation of the co-defendant Cummings who ultimately cooperated as a witness for the government (J.T. 470) indicates an antagonistic role to the best interest of the defendant. The dispute over payment of attorney's fees exacerbated the conflict, so that it would be unfair to charge the preparation time of this attorney to the inexperienced substitute.[40] When the court appointed counsel, it gave him less than the statutory mandated 30-day period in which to

[40] In United States v. Daly, Nos. 81-1654, etc., (9th Cir. 4 October 1983), the court recognized that a limited or special appearance of other counsel is not chargeable to this minimum 30-day defense preparation period.

prepare. This contravention of the Congressionally mandated minimum standard supports the reversal granted by the court of appeals.

Through intuition or common sense recognition of the need for a minimum preparation period, Mr. Levine because of the voluminous discovery and lengthy government investigation as well as the trial of a case in which the trail had grown stale for four and a half years, sua sponte requested a minimum 30-day period for newly appointed counsel to prepare for trial. Reference to this ten-month-old statutory right was not referred to by appointed counsel or the court, even though newly appointed counsel did make the request for a 30-day continuance.[41] Skilled, experienced, or reasonably competent counsel would have apprised the

[41] Skilled defense counsel had early alerted the trial court to the recently adopted 30-day defense preparation period. See Docket Entries (2-22-80).

court of the statutory mandate that should have permitted at a minimum the 30 days in which to prepare. Failure to articulate the important statutory right to prepare was a serious dereliction.

THE SERIOUS MISINTERPRETATION OFTHE CRIMINAL JUSTICE ACT BY THE DISTRICT COURT IN PROVIDING APPOINTED COUNSEL AND EXPERT ASSISTANCE REQUIRED A NEW TRIAL.

Purpose of the CJA

In 1963 the ad hoc appointment of attorneys to represent those charged with serious crime was considered an obligation of the bar rendered without compensation or reimbursement. Although courts did appoint counsel, the role of the defense counsel was less than satisfactory. The importance of defense counsel was recognized by the Allen Report which stated:

> The essence of the adversary system is challenge. The survival of our system of criminal justice and the values which it advances depends upon a constant, searching, and creative

> questioning of official decisions and assertions of authority at all stages of the process. The proper performance of the defense function is thus as vital to the health of the system as the performance of the prosecuting and adjudicatory functions. . . . It is also clear that a situation in which persons are required to contest a serious accusation but are denied access to the tools of contest is offensive to fairness and equity.[42]

In reviewing the role of appointed counsel under the Criminal Justice Act, this Court in Ferri v. Ackerman, 444 U.S. 193 (1979), stated:

> [T]he primary office performed by appointed counsel parallels the office of privately retained counsel. Although it is true that appointed counsel serves pursuant to statutory authorization and in furtherance of the federal interest in ensuring effective representation of criminal defendants, his duty is not to the public at large, except in that general way. His principal responsibility is to serve the undivided interests of his client. Indeed, an indispensable element of the effective performance of his responsibili-

[42]Allen, Report of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice 11 (1963).

> ties is the ability to act independently of the Government and to oppose it in adversary litigation.[43]

Counsel not Properly Selected by the District Court under the CJA

The district court, having no prior knowledge of counsel appointed to serve, selected counsel from "an alphabetical listing." The CJA requires that attorneys serving on a panel for CJA appointments "be selected from a panel of attorneys designated or approved by the court . . . 18 U.S.C. § 3006A(b). The court has a Congressionally designated responsibility to ensure minimum compliance with the CJA requirements of adequacy of counsel in a federal criminal case. This judicial responsibility cannot be neglected by leaving appointments up to inexperienced attorneys selected at random by a "wheel of fortune" (alphabetical listing). The use of

[43]Cited in Polk Co. v. Dodson, 102 S. Ct. 445, 450 n.8 (1981).

inexperienced tyros on major federal criminal litigation is inconsistent with the CJA, and the court of appeals was proper in exercising this Congressionally created supervisory role over the district court in its failure to maintain minimum compliance with the letter and spirit of the CJA.[44]

Judicial Misadvice as to the Availability of Experts

Inexperienced counsel's most "pressing" need was that of an accountant (R.T. 22). The district court advised the defense neophyte that under the CJA "$300 is the most we can pay and that doesn't get much accounting but it is better than none, I guess." Since the appointed defense lawyer

[44]Attached as Appendix B is a letter to the trial judge seeking certification of extracts of the district plan and number of attorneys serving on the panel in 1980 for the Western District of Oklahoma. No response has been received at the time this brief has been submitted, but if a response is filed, the Court is requested to treat it as a supplement to the record (Fed. R. App. P. 10(e)) or take judicial notice of it (Fed. R. Evid. 201(f)).

did not have criminal law experience and had to defer to the wisdom of the court for an interpretation of the Criminal Justice Act, this advice contradicted the provision that would have allowed an expert in excess of $300 with prior approval of the district court judge as well as the chief judge of the circuit. 18 U.S.C. § 3006A(e)(3).[45]

No further request for any accounting services was made, and it is difficult to calculate the impact of the lack of such an essential expert in a case that turned upon the characterization of the "floating" of checks in the financial artifice or scheme alleged by the government in thirteen counts.

Defective "Investigative" Services

The district court appointed Ryland Rivas as a "investigator," but the district

[45] See also VII Guide to Judiciary Policies and Procedures, Guidelines for the Administration of the Criminal Justice Act, § 3.02.

court may have been unfamiliar with his role because the district court did not know his name at start of trial. (J.T. 2). The government contends that this "investigator" was in fact supervisory counsel, but the CJA Form 21[46] revealed that his total claim was for $300. Since appointed defense counsel on the CJA Form 20 indicated 32 hours, it would appear that investigator Ryland L. Rivas received less than $10 an hour for his in-courtroom assistance. Although there was a representation that some assistance was provided prior to trial, the CJA Form does not indicate the hours of services provided for this attorney.[47]

Given the nature of the claim for services, the lack of detail, and the amount

[46]Not the CJA Form 20 used for attorney services.

[47]Although as an investigator under the judge's misinterpretation as to the $300 absolute maximum for expert or other services under the CJA, this amount may have been submitted, but unlike appointed counsel Colston there was no listing of hours even though there was a cutoff for the statutory maximum.

requested, it is difficult to sustain the view that this attorney exercised the control, direction, and management of the case. The characterization of Mr. Rivas as an "investigator" forecloses the government from now changing his role to legal architect and director of the trial. The record does not substantiate that type of participation. It might have been a different case if Mr. Rivas was appointed by the court and Mr. Colston was named as "investigator."

The Court of Appeals has a Supervisory Role Over the Administration of the CJA

To ensure professional independence for the defense advocate, Congress struggled for a mechanism or a device to insulate appointed defense counsel from governmental pressures. The device chosen was the use of the Judicial Conference of the United States which would establish rules and regulations

for the governing of plans formulated initially in the district court but approved and reviewed by the circuit judicial council. 18 U.S.C. § 3006A(a) and (i). The Judicial Council of the Circuit has the right to supplement the district court plan prior to approval and the right to modify it at any time. Congress intended that the district court judges be kept at length from the operation of the defense service, but allowed for differences within the different circuits. The implementation of a district court plan by the Tenth Circuit is a matter uniquely within the scope and authority of the Tenth Circuit which should be given greater latitude in interpreting the requirements of the Criminal Justice Act in light of the demonstrated Congressional

intent.[48]

As to an interpretation of the Sixth Amendment, this Court has ultimate say. In the spirit of allowing experimental flexibility within the circuits, deference should be paid to the circuits' implementation and enforcement of the CJA in their own districts. The action of the court in this case was necessary to effectuate the Congressional policies of the CJA.

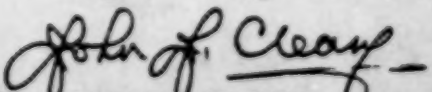
CONCLUSION

Although the appointed attorney admirably responded to the "call of duty," the representation provided by one so

[48]The Federal Courts Improvement Act of 1982, Pub. L. 97-164, 96 Stat. 53 (2 Apr. 82), substituted "court of appeals" for "judicial council" in the supervisory authority of the federal public defender as well as the body making reports to the Judicial Conference of the United States. This change balanced the addition of district judges to the circuit judicial councils, but in principle Congress gave the supervisory control to the reviewing courts rather than the district court which might exercise undue control over the defense advocate and compromise professional independence.

untrained and inexperienced in federal criminal law was at worst a sham, at best a professional disgrace. If ours is an adversary system, then those who serve as appointed counsel should have some minimum qualifications and an adequate opportunity to prepare. Both were absent in this case. To now look for "prejudice" is to say that the Sixth Amendment and CJA right to counsel mean no more than a "warm body," for appellate courts with hindsight clarity will characterize the defense as a "low visibility" strategy. The Court's tolerance of this low level advocacy will only increase its use. The Court should now speak to the need for quality representation in a serious federal criminal case.

Respectfully submitted,



November 1983 JOHN J. CLEARY
California Attorneys for
Criminal Justice

Attorney for Amici Curiae

IN UNITED STATES ☐ MAGISTRATE ☒ DISTRICT ☐ APPEALS COURT or ☐ OTHER PANEL (Specify below)

IN THE CASE OF: United States v. Cronic

AT: Western District of Oklahoma, Oklahoma City, Oklahoma

LOCATION NUMBER: 16605

PROCEEDING (Describe briefly): All proceedings.

CHARGE/OFFENSE (Describe if applicable & check box): Mail fraud (13 counts) — U.S. or other code citation: 18:1341; 2 — ☒ Felony ☐ Misdemeanor

1 ☒ Defendant – Adult
2 ☐ Defendant – Juvenile
3 ☐ Appellant
4 ☐ Probation Violator
5 ☐ Parole Violator
6 ☐ Habeas Petitioner
7 ☐ 2255 Petitioner
8 ☐ Material Witness

DOCKETED

DOCKET NUMBERS: Magistrate; District Court: CR-80-21-E; Court of Appeals

VOUCHER NUMBER: 162965

PERSON REPRESENTED (Show full name & check box): Harrison F. Cronic — Name already appears as ☐ 1 or as ☒ 2 above

COURT ORDER

☒ APPOINTING COUNSEL
☐ RATIFYING PRIOR SERVICE
☐ EXTENDING APPOINTMENT FOR APPEAL
☐ SUBSTITUTING COUNSEL FOR (Name of prior counsel) (Date appointed)

Because the above named person represented has testified under oath or has otherwise satisfied this court that he or she (1) is financially unable to employ counsel and (2) does not wish to waive counsel, and because the interests of justice so require, the attorney or organization named below

Chris E. Colston

is hereby appointed to represent this person in the above designated case.

If appointment is made by a magistrate and the case subsequently proceeds to U.S. District Court, the appointment shall remain in effect until terminated or a substitute attorney is appointed.

The attorney or organization herein appointed is authorized to claim reimbursement on this form subject to applicable law, administrative regulations and the plan of the court.

Signature of U.S. Judge/Magistrate

BY ORDER OF THE COURT

(Clerk or Deputy)

FOR SERVICES & EXPENSES VOUCHERED BELOW

* TIME SPENT	DATES	HOURS	AMOUNT
I IN OPEN COURT			
A ARRAIGNMENT &/OR PLEA			
B MOTIONS & REQUESTS	[illegible]	[illegible]	
C BAIL HEARINGS			
D SENTENCE HEARINGS	[illegible]	[illegible]	
E TRIAL	[illegible]	[illegible]	
F REVOCATION HEARING			
G APPEALS COURT			
H OTHER (Specify below)	[illegible]	[illegible]	
TOTAL "IN COURT" HOURS		30.0	$ 1194
II OUT OF COURT			
A INTERVIEWS & CONFERENCES	[illegible]	45.0	
B OBTAINING & REVIEWING RECORDS	[illegible]	32.7	
C LEGAL RESEARCH & DRAFTING	[illegible]	15.5	
D INVESTIGATIVE & OTHER WORK (Specify)			
Perfect Appeal to 10th Circuit	[illegible]	5.2	
E TRAVEL TIME (during normal office hours only)			
(1) TO & FROM COURT (round trip not under 1 hr. not allowed)			
(2) OTHER TRAVEL TIME (Specify)			
TOTAL "OUT OF COURT" HOURS		98.4	$ 1992
TOTAL COMPENSATION FOR "IN COURT & OUT OF COURT" TIME			$ 1800

RATE PER HR: $ 30 / $ 20 — HOURS TIMES RATE

III ITEMIZED EXPENSES (Specify on continuation sheet)

	AMT. PER ITEM
Long distance telephone calls (see attached for itemized statement)	$ 97.60
TOTAL ITEMIZED EXPENSES	$ 97.60
TOTAL COMPENSATION & EXPENSES	$ 1,797.
DEDUCT AMOUNTS PREVIOUSLY PAID IF APPLICABLE	0
NET AMOUNT CLAIMED	$ 1,797.

* If more space is needed use additional sheets

CERTIFICATIONS OF ATTORNEY/PAYEE

Has compensation and/or reimbursement for work in this case been previously applied for or received? ☐ YES ☒ NO

If "YES", how much were you paid? $

By whom were you paid?

In this or another case did you represent this person in court? ☐ YES ☐ NO

SIGNATURE OF ATTORNEY/PAYEE (SWEAR & AFFIRM THE TRUTH & CORRECTNESS OF ABOVE STATEMENTS): [signature] DATE: 7-1-81

AMOUNT CERTIFIED/APPROVED: $

APPROVED FOR PAYMENT — SIGNATURE OF JUDGE/MAGISTRATE: DATE

SIGNATURE OF CHIEF JUDGE COURT OF APPEALS (Payment is waiver of statutory limitation applied under 18 USC 3006A(d)(3)): DATE: AMT. APPROVED: $

COUNSEL: ☒ IS A PRIVATE ATTORNEY; ☐ IS FURNISHED BY: ☐ COMMUNITY DEFENDER ORGANIZATION ☐ BAR ASSOCIATION OR LEGAL AID AGENCY

PHONE NO. 405-231-3371

VOUCHER NUMBER: 162965

Social Security No. 447-44-2015

ATTORNEY / ORGANIZATION / ADDRESS:

Mr. Chris E. Colston
Attorney at Law
1355 First National Center
Oklahoma City, Oklahoma

ZIP CODE 73102

AT TIME OF APPOINTMENT PLEASE TYPE OR PRINT CLEARLY THE NAME OF ATTORNEY OR ORGANIZATION (PAYEE) AND THE ADDRESS TO WHICH CHECK SHOULD BE MAILED

Copy 2- Retained in court's files

APPENDIX A-1

IN UNITED STATES ☐ MAGISTRATE ☐ DISTRICT ☐ APPEALS COURT or ☐ OTHER PANEL (Specify below)

IN THE CASE OF

United States v. Jeffrey D. Cronic

FOR

Western District of Oklahoma

AT

Oklahoma City, Oklahoma

LOCATION NUMBER

96605

PROCEEDING (Cause or offense)

Private Investigator Services

1 ☒ Defendant — Adult
2 ☐ Defendant — Juvenile
3 ☐ Appellant
4 ☐ Probation Violator
5 ☐ Parole Violator
6 ☐ Material Witness
7 ☐ Other (Specify below)

DOCKETED

DOCKET NUMBERS

Magistrate

District Court

CR-80-71-W

Court of Appeals

VOUCHER NUMBER

149008

PERSON REPRESENTED (Show full name & check 1 box)

Name already appears as ☐ 1 ☐ 2 ☐ 3 ☐ 4 ☐ 5 ☐ 6 ☐ 7 above

ATTORNEY'S STATEMENT

As the attorney for the person represented who is named above, I hereby affirm that (1) the services or expenditures described in the section to the right are necessary to an adequate legal representation or defense in this case and (2) the person represented affirms that he or she is unable to pay for the cost of these services. I therefore request authorization to obtain or incur them at the cost of the United States.

ATTORNEY'S SIGNATURE Date

SUCH SERVICES TO BE PROVIDED BY

NAME Dyland L. Dynes

TITLE OR ORGANIZATION Investigator

TELEPHONE NO. 405-235-3571

COURT ORDER

Financial eligibility of the person represented has been established to the court's satisfaction and authorization requested above is hereby granted.

Signature of Judge or Magistrate Date

SPECIAL AUTHORIZATIONS

APPORTION ___ % TRANSCRIPT COST WITH

Judge Initials

FINDINGS (e.g. pecuniary reimbursement, substantial question) IF REQUIRED BY 28 U.S.C. 752 HAVE BEEN ESTABLISHED

DAILY TRANSCRIPT APPROVED

☐ TRANSCRIPT ☐ INVESTIGATOR ☐ OTHER EXPERT (SEE BELOW)
☐ INTERPRETER ☐ PSYCHIATRIST

Name of attorney or equivalent or other presenting party | Kind of expert if "other"

Check category which box above and briefly describe below the service or expense and justifying reason for request. Receipt may be in separate statement signed by court

ESTIMATED COST

		FOR SERVICES	$
		FOR EXPENSES	$
		FOR TRANSCRIPT	$

TRANSCRIPT

	No. Pages	Per Pg.	Computation	Amount Requested
ESTIMATED TRANSCRIPT COST ORIG.		$	$	$
COPIES		$	$	$

*Exclude free copy for clerk of court

VOUCHER

**See instructions on page reverse

ACTUAL TRANSCRIPT COST ORIG.		$	$	$
COPIES		$	$	$

FOR TRANSCRIPT $

SERVICES & EXPENSES

#		
	SUB TOTALS	FOR SERVICES $
		FOR EXPENSES $

FILED

21 1980

HERBERT T. HOFF
CLERK, U. S. DISTRICT COURT

By Debbie Hoff
DEPUTY

TOTAL CLAIM

CERTIFICATIONS OF ATTORNEY

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Signature of Contractor Payee

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APPROVED FOR PAYMENT

SIGNATURE OF JUDGE MAGISTRATE

Date

$

SIGNATURE OF CHIEF JUDGE COURT OF APPEALS

Payment in excess of statutory limitation approved under 8 USC 3006A(d)(3)

Date

AMT APPROVED $

USE ADDITIONAL BLANK SHEETS IF MORE SPACE IS NEEDED

VOUCHER NUMBER 149008

Social Security No. 445-52-3590
Telephone No. 405-235-3571

PERSON OR ORGANIZATION

Dr. Dyland L. Dynes

ADDRESS

1309 First National Center West
Oklahoma City, OK ZIP CODE 73102

AT THE TIME OF AUTHORIZATION PLEASE TYPE OR PRINT CLEARLY THE NAME OF PERSON OR ORGANIZATION PROVIDING SERVICE (PAYEE) AND THE ADDRESS TO WHICH CHECK SHOULD BE MAILED

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APPENDIX A-2

IN UNITED STATES ☐ MAGISTRATE ☐ DISTRICT ☐ APPEALS COURT or ☐ OTHER PANEL (Specify below)

IN THE CASE OF

USA v. Cronic & Cummings

FOR

Western District of Okla.

AT

Oklahoma City, OK

LOCATION NUMBER: 36405

DOCKET NUMBERS: Magistrate: ; District Court: CR-80-21-E; Court of Appeals:

VOUCHER NUMBER: 149447

PROCEEDING (Attorney to check)

Motions, Hearing, Jury Trial

1 ☐ Defendant — Adult
2 ☐ Defendant — Juvenile
3 ☐ Appellant
4 ☐ Probation Violator
5 ☐ Parole Violator
6 ☐ Habeas Petitioner
7 ☐ 2255 Petitioner
8 ☐ Material Witness
9 ☐ Other (Specify below)

PERSON REPRESENTED (Show full name & mailing address)

Harrison P. Cronic & Carolyn S. Cummings

ATTORNEY'S STATEMENT

As the attorney for the person represented who is named above, I hereby affirm that the services or expenditures described in the items to the right are necessary to an adequate representation or defense in this case and that the person represented affirms that he or she is unable to pay for the cost of these services. I therefore request authorization to obtain or furnish them at the cost of the United States.

ATTORNEY'S SIGNATURE — Date

SUCH SERVICES TO BE PROVIDED BY

NAME: Aubrey Crisp

TITLE OR ORGANIZATION: Court Reporter

TELEPHONE NO: 405-236-8426

COURT ORDER

Financial ability of the person represented to pay has been established to the Court's satisfaction and authorization requested above is hereby granted.

Signature of Judge or Magistrate — Date

SPECIAL AUTHORIZATIONS

PORTION OF TRANSCRIPT COST — Judge's Initials

EXPENSES (As prescribed by Guide to Judiciary Policies and Procedures) IF REQUIRED BY 18 U.S.C. 3006 HAVE BEEN ESTABLISHED

ONLY TRANSCRIPT APPROVED

CERTIFICATIONS OF ATTORNEY

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✓ PAY ME BECAUSE A COPY OF MY ATTACHED CHECK OR RECEIPT SHOWS I PAID FOR TRANSCRIPT

___ PAY CONTRACTOR BECAUSE HE/SHE PROVIDED TRANSCRIPT AT MY REQUEST

Signature of Attorney — Date

☐ TRANSCRIPT ☐ INVESTIGATOR ☐ OTHER EXPERT (BELOW)
☐ INTERPRETER ☐ PSYCHIATRIST

If transcript requested, of what proceeding — Kind of expert, if other

Motions, Hearing, Jury Trial

Check category within box above and in space below the service or expense and justifying reason for request. Reason may be in separate statement signed by Court.

'Transcript of Jury Trial, Motions Sentencing, for purposes of appeal.

TRANSCRIPT

	No. Pages	Rate	Extension	Deduction for Appearance Fee	
ESTIMATED TRANSCRIPT COST: ORIG	671	$	$	$	
COPIES		$	$	$	
ACTUAL TRANSCRIPT COST: ORIG	671	2.00	$	$	
COPIES	671	.50	$	$	1677.50

*Exclude the copy for clerk of court — **See instructions as to lower rates

VOUCHER

SERVICES: FOR SERVICES $; TOTAL $

EXPENSES: FOR EXPENSES $; TOTAL $

TOTAL MISC. COST: FOR TRANSCRIPT $ 1677.50

TOTAL CLAIM $ 1677.50

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Signature of Attorney or Clerk of Court — Date

AMOUNT CERTIFIED/APPROVED $

APPROVED FOR PAYMENT

SIGNATURE OF JUDGE/MAGISTRATE — Date — $

SIGNATURE OF CHIEF JUDGE, COURT OF APPEALS — Payment in excess of statutory limitation approved under 18 USC 3006A(e)(3) — Date — AMT APPROVED $

18 USE ADDITIONAL BLANK SHEETS IF MORE SPACE IS NEEDED

VOUCHER NUMBER: 149447

SS #458-60-6040

PERSON OR ORGANIZATION

AUBREY CRISP
3301 Federal Building
Oklahoma City, OK 73102

ZIP CODE

ADDRESS

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FEDERAL DEFENDERS OF SAN DIEGO, INC.

22 October 1983

Honorable Luther B. Eubanks, Chief Judge
United States District Court
Western District of Oklahoma
3301 Federal Courthouse Building
200 N.W. 4th Street
Oklahoma City, Oklahoma 73102

RE: United States v. Harrison P. Cronic
Supreme Court No. 82-660
District Court Cr. No. 80-21-E

Dear Judge Eubanks:

On behalf of the National Association of Criminal Defense Lawyers and the California Attorneys for Criminal Justice I am preparing an amicus curiae brief in the above-entitled case on behalf of the respondent (defendant). The Clerk of the Supreme Court has granted counsel for the respondent until 9 November 1983 to file the brief. Since the issue of the competency of counsel appointed by the court is in issue, your assistance is sought in clarifying the record.

In 1965 the Western District of Oklahoma Plan under the Criminal Justice Act (CJA) provided for a panel of attorneys to be submitted by five county bar associations to accept appointments under the CJA. The panel would consist of lawyers who are familiar with the rudiments of criminal practice and procedure and provided that it would be composed of young lawyers, experienced lawyers, and lawyers who otherwise do not normally handle criminal cases, for "the responsibility of representing the defendants who are financially unable to obtain an adequate defense shall be a problem and duty of the bar as a whole, not just lawyers who are agreeable to an assignment with regard to accept such work."

Paragraph three of the revised Plan, approved 27 December 1976, provided:

> "APPOINTMENT PANEL - Private attorneys will be appointed by the judges and magistrates of this district from a panel of attorneys approved by the judges of this court. Judges will appoint attorneys from the top of the list. Magistrates will appoint attorneys from the bottom of the list. Periodically as necessary the panel will be republished by the judges of this court."

The Plan modified and approved on 30 December 1980 stated:

"APPOINTMENT PANEL - Private attorneys will be appointed by the judges and magistrates of this district from a panel of attorneys approved by the judges of this court. Said appointments shall be made on a rotational basis subject to the court's discretion to make exceptions due to the nature and complexity of the case, an attorney's experience, and geographical considerations. Periodically as necessary, the panel will be republished by the judges of this court."

Please advise if this is an accurate statement of the pertinent provisions for the appointment and selection of counsel under the CJA Plans for the Western District of Oklahoma.

It is my understanding that in 1980 at the time counsel was appointed for Mr. Cronic that there were approximately 1,000 attorneys on the list for the appointment of counsel. At the time of the appointment of Mr. Colston the court indicated that it had contacted appointed counsel by telephone and obtained his name from an alphabetical listing. I would like to obtain a copy of the complete list of attorneys from which his name was selected.

Your help is sought in ensuring that the Supreme Court gets a complete opportunity to assess the circumstances surrounding the appointment of counsel in this case.

Sincerely,

John J. Cleary

JOHN J. CLEARY
Executive Director

JJC:teh

cc: Hon. Ronald L. Howland
United States Magistrate
3013 U.S. Courthouse
Oklahoma City, Oklahoma 73102

John Pichter Depue, Esq.
Office of the Solicitor General
Department of Justice
Washington, D.C. 20530

Prof. Steven B. Duke
Yale Law School
Box 401A Yale Station
New Haven, Connecticut 06520

APPENDIX B

No. 82-660

Supreme Court, U.S.
FILED
NOV 9 1983
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA,

Petitioner,

—v.—

HARRISON CRONIC,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA, AND THE AMERICAN CIVIL LIBERTIES UNION, AS *AMICI CURIAE* SUPPORTING RESPONDENT

RICHARD J. WILSON*
National Legal Aid and
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Argument

BECAUSE UNFAIR IMPAIRMENTS CREATED BY THE GOVERNMENT PREVENTED RESPONDENT'S COUNSEL AT TRIAL FROM RENDERING THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS, RESPONDENT'S CONVICTION MUST BE REVERSED WITHOUT THE NECESSITY OF DEMONSTRATION OF PREJUDICE. 9

I. THIS COURT'S LONG RECOGNITION OF THE INDISPENSIBLE IMPORTANCE OF THE EFFECTIVE ASSISTANCE OF DEFENSE COUNSEL TO THE ADVERSARY PROCESS REQUIRES ITS STRONG GUIDANCE IN SETTING CLEAR STANDARDS FOR REVIEW OF CLAIMS OF INEFFECTIVE ASSISTANCE ON DIRECT REVIEW OR COLLATERAL ATTACK. 9

II. IN ORDER TO ESTABLISH A DENIAL OF EFFECTIVE ASSISTANCE OF COUNSEL, THE DEFENDANT MAY DEMONSTRATE EITHER THAT COUNSEL SUFFERED FROM AN UNFAIR SYSTEMIC IMPAIRMENT WHICH SO HINDERED REPRESENTATION AS TO NULLIFY THE PRESENCE OF COUNSEL, OR THAT COUNSEL'S ACTION FAILED TO SHOW THE SKILL, JUDGMENT AND DILIGENCE OF A REASONABLY COMPETENT DEFENSE COUNSEL. 34

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III. MINIMUM OBJECTIVE STANDARDS MUST BE ADOPTED TO MEASURE COUNSEL'S FAILURE TO ACT AS REASONABLY COMPETENT COUNSEL, AND THE PROSECUTION MUST BEAR THE BURDEN OF PROOF, IF PREJUDICE ENTERS INTO THE CALCULUS OF COUNSEL'S EFFECTIVENESS. 40

IV. HERE, WHERE COUNSEL WAS FUNDAMENTALLY IMPAIRED BY THE LIMITS OF GOVERNMENTAL COMPENSATION FOR HIS SERVICES, HIS ACCESS TO ESSENTIAL INVESTIGATORY AND EXPERT RESOURCES, HIS OWN INEXPERIENCE, HIS IGNORANCE OF CRIMINAL LAW AND THE CRIMINAL TRIAL, AN INADEQUATE TIME TO PREPARE A DEFENSE, THE GRAVITY AND COMPLEXITY OF THE CHARGES, AND HIS INACCESSIBILITY TO WITNESSES, THE COURT OF APPEALS DID NOT ERR IN CONCLUDING THAT RESPONDENT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL. . . 48

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No. 82-660

In the Supreme Court of the United States

October Term, 1983

United States of America,
Petitioner

v.

Harrison Cronic, Respondent

On writ of certiorari to the United States Court of Appeals for the Tenth Circuit

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Interest of Amici

The National Legal Aid and Defender Association (NLADA) is the sole national voice for the overwhelming majority of public defenders, private attorneys and defender clients who make up its defender membership. Representing nearly 600 member public defender offices and about

7,000 individual defenders, NLADA has spoken out on national issues of concern to the legally indigent and their attorneys in both civil and criminal courts since 1911.

The Association of Trial Lawyers of America (ATLA), founded 38 years ago, is a voluntary national bar association with a membership exceeding 50,000 advocates, of whom approximately 5,000, constituting the Criminal Law Section, regularly appear in both state and federal courts in defense of those accused of crime. The men and women of the Association are dedicated to the preservation of the American legal system, the protection of individual rights and liberties, and the evolution of the common law.

ATLA, through its appropriate officers and committees, has authorized

its participation in this case as Amicus Curiae. ATLA is vitally concerned with this appeal, not only for the instant case, but also for the effect the decision in this case will have on similar cases now pending throughout the country, as well as for its impact on constitutional doctrine.

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan organization of over 250,000 members, founded in 1920, dedicated to preserving and defending fundamental liberties embodied in the Constitution. The ACLU has frequently appeared in this Court to defend the Sixth Amendment's right to counsel, which is indispensable to preservation of other due process rights.

Amici have obtained the written consent of the parties to file a brief in this case.

SUMMARY OF ARGUMENT

Harrison Cronic was denied the effective assistance of counsel guaranteed by the Fifth and Sixth Amendments because unfair impediments created by the Government prevented his attorney from rendering competent representation. Because those impediments were not of his own making, and because Mr. Cronic should not be now put to the burden of proving his likely innocence based on a trial record which is inherently suspect due to his lawyer's action or inaction, his conviction must now be reversed for a new trial with the adequate assistance of counsel.

Amici urge the Court to adopt a test recognizing that counsel may be constitutionally ineffective in two very different ways, one suggested by the Fifth

and Fourteenth Amendment "due process" clauses and one by the Sixth Amendment's "assistance of counsel" provision. Under this test, the defendant is deprived of the effective assistance of counsel when counsel either is unfairly impaired by external or systemic restraints, or fails to exercise "the skill, judgment and diligence of a reasonably competent defense counsel." United States v. Cronic, 675 F.2d 1126, 1128 (10th Cir. 1982)

When the reviewing court finds that the attorney has been unduly restricted by systemic or "structural" impairments, a reversal of the conviction should ordinarily follow, as neither the defendant or his counsel can be faulted for the failure of the State to provide a funda-

mentally fair proceeding, and allocation of prejudice would be entirely speculative and conjectural.

Where, however, the failure lies substantially within the attorney's personal control; i.e., his or her errors relate to "skill, diligence and judgment," the inquiry is necessarily subjective. To lend more objectivity to an inquiry into the quality of counsel's performance, the court should adopt specific practice criteria against which counsel's performance can be judged. When these criteria have been substantially complied with, the trial or reviewing court may rest assured that the defendant's conviction was fairly obtained, at least as to ade-quacy of counsel. Where there is a significant shortcoming in these standards, however, the government

carries a heavy burden to demonstrate why the conviction should not be reversed.

ARGUMENT

BECAUSE UNFAIR IMPAIRMENTS CREATED BY THE GOVERNMENT PREVENTED RESPONDENT'S COUNSEL AT TRIAL FROM RENDERING THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS, RESPONDENT'S CONVICTION MUST BE REVERSED WITHOUT THE NECESSITY OF DEMONSTRATION OF PREJUDICE.

I

THIS COURT'S LONG RECOGNITION OF THE INDISPENSIBLE IMPORTANCE OF THE EFFECTIVE ASSISTANCE OF DEFENSE COUNSEL TO THE ADVERSARY PROCESS REQUIRES ITS STRONG GUIDANCE IN SETTING CLEAR STANDARDS FOR REVIEW OF CLAIMS OF INEFFECTIVE ASSISTANCE ON DIRECT REVIEW OR COLLATERAL ATTACK.

The history of the Court's decisions demonstrates a growing and now firmly established principle that counsel is an indispensable adjunct to fairness in a criminal trial. Counsel, it may be said, is the sine qua non of all other procedural rights. The Government's assertion that the right to counsel "supplements" other Sixth Amendment rights (Brief for

the United States, at 25) is disingenuous, and belittles a strong history establishing counsel as the cornerstone of the adversary system.

As early as Powell v. Alabama, nearly fifty years ago, this Court eloquently gave voice to the need for counsel's "guiding hand":

> The right to be heard would be in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skills and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him.
>
> Powell v. Alabama, 287 U.S. 45, 68-69 (1938)

Powell, of course, relied on the Due Process clause to find a denial of fundamental fairness to nine illiterate black youths, the "Scottsboro Boys," accused of capital rape. Undeniably, the young men had "counsel" at their trial. The Court found that the circumstances leading up to counsel's performance in trial, however, were such as to create an insurmountable impediment to fairness. Id. at 56, 69.

In Gideon v. Wainwright, 372 U.S. 335 (1963) the Court found that defense counsel was as much a necessity as prosecutors in state felony proceedings:

> That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged

> with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.
>
> Id. at 344.

These and many other decisions of this Court demonstrate that competent counsel is the bulwark of the adversary system.[1] In fact, the adversary system presumes attorney competence, and the failure to provide competent counsel to both sides in a criminal trial threatens

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[1] See, e.g., Argersinger v. Hamlin, 407 U.S. 25 (1972); Douglas v. California, 372 U.S. 353 (1963); In re Gault, 387 U.S. 1 (1967).

the structure of our system. See Damaska, "Presentation of Evidence and Factfinding Precision," 123 U.Pa.L.Rev. 1083, 1091 (1975). Further, beyond preserving the institutional integrity of the system, society has an interest in guaranteeing the accuracy of results of criminal trials. If society did not care so fervently about fairness, it could as easily turn to the inquisitional model to find the "obviously" guilty. Because of this concern for fairness, this Court must speak firmly and clearly to courts below to guarantee the maintenance of adequate counsel for rich and poor alike. Former Justice Schaefer of the Illinois Supreme Court summarized our justifiable reliance on the right to counsel as the cornerstone of justice when he said, "Of all the rights that an accused person has,

the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have." Schaefer, "Federalism and State Criminal Procedure," 70 Harv.L.Rev. 1, 8 (1956).

More practical law school training, continuing legal education programs, specialization and certification may, in the long run, help to alleviate much of the problem of attorney competence. See, e.g., ABA Section of Legal Education and Admission to the Bar, Final Report, Task Force on Lawyer Competency: The Role of Law Schools (1979); ALI-ABA Committee on Continuing Professional Education, A Model Peer Review System (Discussion Draft, 1980); Final Report of the Task Force on Professional Competence (ABA, July 1983). Each of these tasks, however,

is long-term and requires investment of immense resources.

The provision of money damage remedies to the defendant, either through a malpractice or civil rights action, provides no viable deterrent to lawyer ineffectiveness for several reasons. First, and most important, these remedies do not provide what the Constitution guarantees: the opportunity for vindication in a full and fair hearing. Second, law and experience greatly restrict these remedies. Civil rights actions under 42 U.S.C. Sec. 1983, are impossible since this Court has held that neither the private attorney, appointed counsel or public defender acts "under color of state law," for jurisdictional purposes, while performing his or her duties as "personal counselor and advocate" for the accused. Polk County v.

Dodson, 454 U.S. 312, 318 (1981)[2] In malpractice actions, the painful fact is that while the appointed lawyer is not immune from suit, Ferri v. Ackerman, 444 U.S. 1983 (1979), such suits are almost impossible to bring without the help of an attorney, and are difficult to prevail in, due to the hostility of judges and juries.[3]

Finally, attorney disciplinary proceedings suffer from the same

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[2] This term, the court will review the question of whether the public defender, like prosecutors and judges, should be afforded immunity under 42 U.S.C. 1983, when a conspiracy with government officials is alleged. Tower v. Glover, No. 82-1988, Cert. granted Oct. 3, 1983.

[3] Records available to the NLADA reveal only one malpractice suit brought against a public defender in St. Louis on grounds of ineffective assistance, which was ultimately settled. "New Worry for Public Defenders," St. Louis Post-Dispatch, 1, 8 (Jan. 9, 1983)

shortcomings as the damage remedy. They come too late and they do nothing to help the party most aggrieved: the wrongly convicted defendant. They are virtually of nonexistent in situations in which the defendant's conviction is upheld on appeal.

Thus, however imperfect direct or collateral review may be, and however inexact the standard for review, this remedy is the only effective means of correcting wrongs occasioned by counsel's ineffectiveness.

Articulation of the standard for effectiveness of counsel has progressively moved from one requiring reduction of the proceedings to a "farce or sham" before reversal is justified to one which may be summarized as requiring

"reasonably competent counsel."[4] Courts and commentators have struggled to discover whether this change in the wording of the standard has been followed by a change in the number of convictions attacked or reversed. Some suggest that these generalized standards are no more than a "semantic merry-go-round," a change in form only. See United States v. Decoster ("Decoster III"), 624 F.2d 196, 206 (D.C. Cir. 1979), quoting Cooper v. Fitzharris, 557 F.2d 1162, 1166 (9th Cir. 1977) (Duniway, J., concurring). Others suggest that the "more stringent 'reasonably competent' test" was in fact

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[4] A detailed description of the Circuits' transition from "farce and mockery" to "reasonable competence" standard is adequately compilated and described in the Brief for the United States, at 32-33 and Appendix B, and will not be reiterated here.

applied even while courts continued to formally adhere to the "farce and mockery" standard. See Dyer v. Crisp, 613 F.2d 275, 278 (10th Cir. 1980).

In an effort to discover how the standard has been applied in fact, the National Legal Aid and Defender Association[5] conducted research specifically for the Amicus brief in this case. A computer and library sample of reported state and federal appellate decisions was collected for the period between 1970, the date of this Court's decision in McMann v. Richardson, 397 U.S. 759 (1970), and July of 1983. Our sample included reported decisions of the U.S. Circuit Courts of Appeal, as well as all state appellate

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5 Assisted by funding from the ABA's Bar Information Project of the Standing Committee on Legal Aid and Indigent Defendants.

courts, both intermediate and final. For purposes of examining the question of "systemic" or "personal" ineffectiveness,[6] we excluded those cases reviewing ineffectiveness on grounds of a purported conflict of interest. We did not individually review all decisions in which an issue of ineffectiveness of counsel was raised. We did review and catalog all cases in our case sample.[7] The

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[6] "Systemic" and "personal" ineffectiveness refer to the distinction between counsel's ineffectiveness allegedly caused by external impairment, and ineffectiveness resulting from counsel's "untrammelled and unimpaired" performance. Cf., United States v. Decoster, supra 624 F.2d at 202.

[7] We have included as Appendix A all cases in which relief was granted by the reviewing court on grounds of ineffective assistance of counsel; i.e., reversal and remand for a new trial, grant of a writ, etc. We did not pursue the appellate cases in which relief was granted back to the trial courts. Thus, no data is reported here on reconviction rates, dismissal or acquittal at retrial.

results of our examination are both revealing and disturbing.

The computer reports that between 1970 and July of 1983, a total of 8,460 reported decisions were rendered in the Federal and State courts of review in which an issue regarding "personal" or "systemic" (i.e., "non-conflict-of-interest") ineffectiveness was raised.[8] Of those cases, we individually reviewed a sample of 4,403, or approximately 52%. Our sample was keyed to all cases in which the computer indicated that counsel had

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[8] Of these decisions, 1,996 were in federal courts of review, while 6,464 were decided in state courts, both in intermediate and high.

been appointed or assigned, whether public defender or private counsel.[9]

From the original sample of 4,403, our individual review included a "cleaning" of the computer data to eliminate erroneous citations, cases not on point, limited remands, etc. This reduced our sample by about 10% to approximately 4,000.

Of the 4,000 remaining appellate decisions, only 159, or 3.9%, resulted in a grant of relief to the defendant on grounds of ineffectiveness of counsel. Such a small number, might be considered "statistically insignificant."

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[9] Disparities between the percentage of appeals here reported involving assigned counsel and reported indigency rates, infra, p. 9, are explained easily by very high guilty plea rates for appointed counsel. Such cases seldom result in appellate review. See, NLADA The Other Face of Justice, supra at 30, Table 44.

To further study the impact of the change in the standard, we studied distribution of the cases by the year of their decision, to determine purportedly if the "evolving" standard resulted in more reversals in more recent years.

Yearly breakdown of the decisions is as follows:

Figure 1

Appellate Decisions Where Relief Granted on Ineffectiveness of Counsel Grounds, By Year.

Year	No. of Cases
1970	7
1971	6
1972	6
1973	8
1974	11
1975	9
1976	13
1977	13
1978	15
1979	13

Appellate Decisions Where Relief Granted on Ineffectiveness of Counsel Grounds, By Year. (Cont'd.)

Year	No. of Cases
1980	17
1981	11
1982	19
1983 (to 7/1)	11
TOTAL	159

While a slight increase has occurred in the incidence of reversals over the past 13 years, the increase is insignificant, given the small number of cases each year as a percentage of all reported appellate decisions.

Without further analysis, however, a number of conclusions can be drawn from the data presented. First, and most important, there is no evidence that adoption of a "more stringent" test requiring "reasonable competence" of

counsel has or will result in an "opening of the floodgates" on appeal. The evidence shows that the claim is both infrequently raised[10] and rarely successful.[11] This court has the opportunity to provide leadership and guidance to the lower courts in their proper articulation and application of the standard.

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[10] The 8,460 total cases in which the claim was raised from 1970 to 1983 must be compared to an annual average number of criminal appeals in the federal courts of appeal alone of approximately 4,425 cases nationally between 1971 and 1980. Bureau of Justice Statistics, 1981 Sourcebook of Criminal Justice Statistics Table 5.22 (1982). This translates to nearly 60,000 federal cases during the period of our survey. Thus, claims of ineffectiveness occurred in less than 3.3% of all federal criminal appeals during the period studied.

[11] In his insightful analysis of the issue, Judge Bazelon bluntly concludes: "One of the major reasons that the problem of ineffective assistance has remained hidden is the appellate court's remarkable propensity to ignore the issue of ineffective assistance and to paper over the cracks in the house that Gideon built." Bazelon, "The Defective Assistance of Counsel," 42 U. Cin. L. Rev. 1, 21 (1973).

Second, the lack of any real difference in outcomes due to a new and purportedly more strict standard means that the "new" standard has not accomplished that which it seeks - to raise the quality of advocacy so as to more nearly approximate due process and equal justice in our nation's courts. This is because the "new" standard is no less subjective than

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(Footnote 11 Cont'd.)

Judge Bazelon suggests this "papering over" of cases occurs because of real or imagined concerns that: (1) if courts reversed all convictions where it was proper on this ground, "half the convictions" would be remanded; (2) if reversals occurred, there would not be enough competent lawyers to handle the defense of the indigent; (3) if the lawyers were competent in the first place, the system would grind to a halt; (4) the reviewing court may unnecessarily "soil" the reputation of the attorney who is found to be ineffective; or (5) most criminal defendants are guilty anyway. Id. at 23-27. The article explains why each of these factors is either erroneous or irrelevant to the decision of the reviewing court.

the "old." The only remedy is the adoption of more specific and objective criteria, as is proposed below.

Third, a closer review of these cases reveals that the errors of counsel were very frequently occasioned by a systemic impairment or restraint which worked to unfairly inhibit or even nullify representation by counsel, although counsel was "bodily" in the courtroom, totally apart from counsel's personal skills or abilities.[12] Several instances of this sort were discovered in our review of these cases, and their relationship to the case at bar should be immediately apparent.

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12 Our rough and unscientific count of such instances identified 111 of the 159 case sample as real or possible cases of "systemic failure in adequacy of representation."

In Walker v. Caldwell, 476 F.2d 213 (5th Cir. 1973), the defendant had been charged in Georgia with seven counts of burglary, three counts of theft by taking and one count of carrying an unlicensed pistol. Six days after his arrest, he appeared with appointed counsel and pled guilty to all charges, receiving a sentence of three years for each of the ten charges, the sentences to be served consecutively, for a total of thirty years imprisonment. On the one remaining charge, Walker received a six month concurrent sentence. Id. at 214.

The Court of Appeals ordered issuance of a writ of habeas corpus on grounds that Mr. Walker had been denied effective assistance of counsel. Among its findings on appeal was the fact that

the attorney who represented Walker worked in an office adjoining the courtroom, that the attorney handled roughly ninety percent of the appointed cases in the court, without fee, and that the lawyer represented about 500 defendants each year, averaging about ten cases each "plea day."

The lawyer for Walker testified that his usual practice was to talk to each client for ten to thirty minutes on an average plea day. It was admitted that he had not investigated the facts in this case, talked to any witnesses, explored any motions or engaged in any plea bargaining. The lawyer testified that he follows a "substantially different practice" when representing fee clients rather than appointed clients. The de-

fendant was illiterate, and his pleas of guilty were signed by his attorney. Id. at 215.

Noting each of these factors, the Court of Appeals overturned the convictions, relying on the language of this court in Von Moltke v. Gillies, 232 U.S. 708 (1948), when the court said, "we cannot accept this designation of counsel by the trial court as anything more than token obedience to his constitutionally required duty to appoint counsel for petitioner." Von Moltke v. Gillies, supra, 232 U.S. at 723. That is to say, in Walker, as in Von Moltke, Powell v. Alabama, and the case at bar, a lawyer was in the courtroom with the defendant, but was only a "token."

In Washington v. Maroney, 428 F.2d 10 (3d Cir. 1970) the Court of Appeals overturned a Pennsylvania conviction of armed robbery and burglary, for which consecutive sentences of ten to twenty and two and one-half to five years imprisonment were imposed, respectively, after a bench trial. The basis for reversal was the conduct of the case by an attorney with the Allegheny County Legal Aid Society.

Although interviewed by a social worker from the Society who visited him in jail to determine his eligibility for services, the defendant did not see his attorney until the day of his trial, thirteen days later. The defendant testified that he saw his attorney for about "one moment" before the trial began, while his attorney said he did not recall the defen-

dant or the case at all. Id. at 12. Indicating that there was "no indication in the record of any preparation whatsoever by the attorney," Id. at 13, the Court of Appeals remanded for issuance of the writ of habeas corpus, holding that the defendant "did not have the vigorous representation which one expects in the usual adversary proceeding..." Id. at 14.

In both Walker and Washington, as in many of the other cases discovered in this review of reversals,[13] there was a common

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13 Other examples include State v. Pelfrey, 256 S.E. 2d (W.Va. 1979) (appointed counsel failed to move for mistrial, despite belief that error had occurred, due solely to economic disincentive to try the case again); State v. Marrero, 155 N.J. Super. 567 (1978) (assistant public defender failed to seek pre-trial intervention and diversion for defendant, despite the fact that another public defender in the same office had successfully moved for

theme which emerged. In each case, the reviewing court put great emphasis on the fact that the inadequacies in representation related as much to the structure or system in which the derelictions occurred as to the personal actions or inactions of the attorney appointed. In each case, the courts found that, although a lawyer was present in the courtroom, this impairment or restraint resulted in a denial of effective assistance of counsel requiring reversal of the conviction.

(Footnote 13 Cont'd.)

diversion of this defendant on this charge after his conviction, without knowledge of other public defender's actions); Blankenship v. Commonwealth, 554 S.W. 2d 898 (Ky. App. 1977) (public defender "system" failed to file transcript for defendant, resulting in dismissal of appeal); People v. Gonzalez, 43 App. Div. 2d 914 (N.Y. 1974) (new attorney from Legal Aid Society, assigned at sentencing, knew nothing about case and did not assist defendant at

II

IN ORDER TO ESTABLISH A DENIAL OF EFFECTIVE ASSISTANCE OF COUNSEL, THE DEFENDANT MAY DEMONSTRATE EITHER THAT COUNSEL SUFFERED FROM AN UNFAIR SYSTEMIC IMPAIRMENT WHICH SO HINDERED REPRESENTATION AS TO NULLIFY THE PRESENCE OF COUNSEL, OR THAT COUNSEL'S ACTION FAILED TO SHOW THE SKILL, JUDGMENT AND DILIGENCE OF A REASONABLY COMPETENT DEFENSE COUNSEL.

In its brief, the Government relies totally on an "error-based" analysis of the issue of ineffectiveness. (Brief for the United States, at 15 et seq.). This analysis unduly restricts the inquiry of the Court, and fails to acknowledge the development of the right to effective assistance of counsel in Fifth, Sixth and

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(Footnote 13 Cont'd.)

sentencing stage); State v. Jackson, 534 P.2d 281 (Ariz. App. 1975) (new public defender appearing on day of trial because of unavailability of deputy who had been assigned case and had prepared it for trial, was ineffective in trial representation); Williams v. Twomey, 570 F.2d 634 (7th Cir. 1974) (same fact pattern as State v. Jackson, supra).

Fourteenth Amendment contexts. Moreover, the requirement that the defendant identify specific and significant errors ignores precedent of this Court to the contrary and constitutes a highly subjective test for ineffectiveness of counsel which the Court should reject.

That the law of ineffectiveness of counsel finds it roots in both the Fourteenth and Sixth Amendments to the Constitution has already been demonstrated. Supra, at 10 - 12. By following the development of the caselaw under the Fourteenth Amendment, which requires an ad hoc inquiry into the fundamental fairness of the proceedings due to the alleged failings of counsel, it is readily apparent that the focus of the due process inquiry lies on the systemic impairment

of counsel which actually or effectively "removes the guiding hand" from the proceedings. This occurs when counsel is either totally absent, or is barred from the opportunity to appear or function in the traditional advocacy role as counsel. See, Ferguson v. Georgia, 365 U.S. 570 (1961) (prohibition against direct examination of the defendant); Hamilton v. Alabama, 368 U.S. 52 (1961) (denial of counsel at arraignment); Brooks v. Tennessee, 406 U.S. 605 (1972) (requirement that defendant be first defense witness); Herring v. New York, 422 U.S. 853 (1975) (denial of right to summation in non-jury case); Geders v. United States, 425 U.S. 80 (1976) (prohibition against consultation with defendant during overnight recess).

In each of these situations, the Court has reversed the conviction without the requirement of any specific showing of prejudice, due to the fact that the defendants were deprived of counsel at a critical point in the proceedings.[14]

Amici urge the adoption of a test for ineffectiveness of counsel which recognizes this line of authority as well, and under which no showing of prejudice is required. Under the due process "prong" of the test, the initial inquiry of the court must be whether counsel was substantially impaired, by factors outside of his or her control, from rendering effective assistance of counsel thereby

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[14] Our analysis of these cases does not differ in this respect from that of the Solicitor General. Brief for the United States, at pp. 27-29.

inhibiting a full and fair development of facts and law. If so, the conviction must be reversed without inquiry into prejudice, since such an inquiry would be futile.

This test is implicitly recognized by both the Government in its brief and the Tenth Circuit in its decision below.

The Solicitor General premises the entire argument of the Government on the assertion that:

> A number of considerations pertaining to the nature and purposes of an inquiry into counsel's performance at trial strongly suggest that where counsel was unfettered by external restraints on his ability to fulfill a lawyer's traditional role, a court may set aside a conviction on the basis of assertedly ineffective assistance of counsel only upon a showing of serious errors that substantially prejudiced the accused or fundamentally undermined the fairness of the proceedings.
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> Brief for the United States, at 16. (Emphasis added)

Thus, while asserting that prejudice may have to be shown in some cases, the Government acknowledges an exception from its proposed test when "external restraints" occur.

The test proposed here is exactly that which was applied by the court of appeals in its decision below. In citing to United States v. Golub, 638 F.2d 185 (10th Cir. 1980) the court referred to instances in which "circumstances hamper a given lawyer's preparation of a defendant's cases." United States v. Cronic, supra, 1126 F.2d at 1128. In enumerating the circumstances articulated in King and Golub,[15] the court was stating nothing

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[15] These include "(1) the time afforded for investigation and preparation; (2) the experience of counsel; (3) the gravity of the charge; (4) the complexity of possible defenses; and (5) the accessibility of witnesses to counsel." United States v. Cronic, supra, 675 F.2d at 1129.

more than the fact that these circumstances, taken in their cumulative impact in this case,[16] can and did effectively bar the defendant's attorney from performance of his functions as an advocate, thereby depriving defendant of counsel at a critical stage in the proceedings. This Court, too, should adopt this test, find that it was not met in this case, and affirm the decision of the court of appeals.

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[16] The Solicitor's seriatim discussion of the various factors involved in the result reached by the court of appeals is a classic example of "divide and conquer" strategy. Brief for the United States, at 35-44. Cases cited as to each individual circumstance may be accurate, but no authority cited speaks to the cumulative impact of these circumstances.

III

MINIMUM OBJECTIVE STANDARDS MUST BE ADOPTED TO MEASURE COUNSEL'S FAILURE TO ACT AS REASONABLY COMPETENT COUNSEL, AND THE PROSECUTION MUST BEAR THE BURDEN OF PROOF, IF PREJUDICE ENTERS INTO THE CALCULUS OF COUNSEL'S EFFECTIVENESS.

If this Court also applies a Sixth Amendment test suggesting that counsel must exercise "the skill, judgment and diligence of a reasonably competent defense attorney," Amici would urge the Court to apply more objective criteria against which to measure counsel's performance than the test itself suggests.[17]

Commentators and courts have increasingly given voice to the fact that

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[17] These objective criteria should also be adopted even if this court requires proof of "serious derelictions" by counsel, as the government suggests. Brief for the United States, at 16. The prosecution's test is certainly no less subjective than that of the court of appeals, and will give precious little guidance to courts below as to its practical application.

more clear and specific standards are needed to measure counsel's performance. Many, if not most, suggest that the American Bar Association's Standards for Criminal Justice are an appropriate starting point. The Standards are described as "comprehensive, realistic, and amendable." Goldblatt, "Ineffective Assistance of Counsel: Attempts to Establish Minimum Standards," The Defense Counsel, 221-247 (McDonald ed. 1983). See also, Alpert and Huff, "Defending the Accused: Counsel Effectiveness and Strategies," The Defense Counsel, 247, 248, 267 (McDonald ed. 1983); Erickson, "Standards of Competency for Defense Counsel in a Criminal Case," 17 Am.Crim.L.Rev. 233-251 (1979); Goodpaster, "The Trial for Life: Effective Assistance of Counsel in Death

Penalty Cases" 58 N.Y.U.L.Rev. 299, 339-345, 362 (1983); Lasater, "The Role of Harm in Ineffectiveness of Counsel Cases: Practice and Policy," 32 Syracuse L. Rev, 759, 790-800 (1981); Joint Committee on Judicial Administration, "District of Columbia Criminal Justice Act Plan," The Daily Washington Law Reporter, 994-997, Section 10 (May 21, 1981).

The guidelines enumerated by Colorado Supreme Court Justice Erickson in his article capture the basic duties of counsel in a clear and articulate fashion:

1. Counsel must diligently and actively participate in the full and effective preparation of his client's case.

2. Counsel has a duty to investigate clearly all defenses of fact and of law that may be available to the defendant.

3. Counsel must confer with his client without undue delay and as often as necessary to elicit matters pertinent to his defense.

4. Counsel should promptly advise his client of his rights and take all actions necessary to preserve them.

5. Counsel should be concerned with the accused's right to be released from custody pending trial, and be prepared, when appropriate, to make motions

for a pre-trial psychiatric examination or the suppression of evidence.

Erickson, supra, 17 Am. Crim.L.Rev. at 245.

These guidelines would give specificity to the expectations of counsel while leaving the necessary flexibility to allow for the exercise of judicial discretion in the determination of whether substantial compliance with the guidelines has occurred on the facts of the case.

In the event that compliance with any of the tests proposed in this Court has not occurred, and the Court determines that counsel has not performed in an effective fashion, the decisions of the Court make clear that the prosecution, not the defense, bears the burden of demonstrating the absence of prejudice to the defendant.

Chapman v. California, 386 U.S. 18 (1967) makes clear that there are "some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error," and refers directly to the right to counsel. Id. at 23, n. 8. However, even if the rule of prejudice demonstration is to be applied, Chapman unequivocally requires the prosecution to bear the burden of demonstrating to the court that there was no

prejudice inherent in the violation of defendant's rights, and that the error was harmless beyond a reasonable doubt. Id. at 24. Cf. Coles v. Peyton, 389 F.2d 224, 226 (4th Cir. 1968); Beasley v. United States, 491 F.2d 687, 689-690, 696 (6th Cir. 1974).

Neither this court's recent decision in United States v. Morrison, 449 U.S. 361 (1981) nor its earlier decision in Chambers v. Maroney, 399 U.S. 42 (1970), dictate a contrary result. While extensive discussion of a prejudice requirement was included in Morrison, the entire focus of the opinion was not on the alleged ineffectiveness of counsel, but on the propriety of dismissal of the indictment for alleged violation of the Sixth Amendment. Id. at 364, 365. Here, the remedy of the court of appeals, rever-

sal of the conviction and remand for a new trial, was entirely appropriate.

In Chambers, the court specifically distinguished the issue of whether, once counsel was determined to be ineffective, prejudicial results of this ineffectiveness had to be separately demonstrated. Chambers v. Maroney, supra, 399 U.S. at 53. Chambers held only that a mere showing of late appointment was not sufficient to establish that counsel was constitutionally ineffective.

IV

HERE, WHERE COUNSEL WAS FUNDAMENTALLY IMPAIRED BY THE LIMITS OF GOVERNMENTAL COMPENSATION FOR HIS SERVICES, HIS ACCESS TO ESSENTIAL INVESTIGATORY AND EXPERT RESOURCES, HIS OWN INEXPERIENCE, HIS IGNORANCE OF CRIMINAL LAW AND THE CRIMINAL TRIAL, AN INADEQUATE TIME TO PREPARE A DEFENSE, THE GRAVITY AND COMPLEXITY OF THE CHARGES, AND HIS INACCESSIBILITY TO WITNESSES, THE COURT OF APPEALS DID NOT ERR IN CONCLUDING THAT RESPONDENT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.

Crime is largely a problem of the poor. Data still shows that the overwhelming majority of criminal prosecutions, sometimes as high as 90% in urban areas, involve legally indigent individuals. Miranda v. Arizona, 348 U.S. 436, 472 n.40 (1966); American Bar Association Standards for Criminal Justice, Providing Defense Services, Standards 5-6.1 to 5-6.3 (1981); ABA Standing Committee on Legal Aid and Indigent Defendants, The Center for

Defense Services: A Draft Discussion Proposal, 4 (February 1978 Draft); Boston University Center for Criminal Justice, Right to Counsel in Criminal Cases: The Mandate of Argersinger v. Hamlin, 309-347 (S. Krantz ed. 1976); National Legal Aid and Defender Association, The Other Face of Justice, 83-84 (1973). Despite this fact, evidence also shows that the indigent defense component of the criminal justice system receives only 1.5% of all state and local expenditures in the criminal justice system, as contrasted with 5.9% for prosecution, 13.1% for courts, 53.2% for police and 24.7% for corrections. Lefstein, Criminal Defense Services for the Poor, 10 (ABA Standing Committee on Legal Aid and Indigent Defendants, 1982), quoting, Bureau of Justice Statistics, U.S.

Department of Justice, 1980 Sourcebook of Criminal Justice Statistics (1981); see also, Wilson, "Empty-Handed Justice," 22 The Judge's Journal 20 (Winter 1983). This tragic and unjustified imbalance in allocation of resources, in and of itself, threatens the core of the adversary system and denies fundamental fairness to the impoverished criminal defendant.

The close review of convictions on direct appeal or by collateral attack actually offers the prospect of long-term money savings. Now, because of the reversal of criminal convictions due largely to appointed counsel's ineffectiveness, costly new trials and appeals occur. The adoption of articulate and strictly enforced standards on review would result in greater realization by government of

the savings occasioned by provision of adequate indigent defense resources at the outset.

Here, Mr. Cronic's counsel was appointed pursuant to the provisions of the Criminal Justice Act of 1964, 18 U.S.C. Sec. 3006A (hereafter CJA). His appointment was approved pursuant to a plan adopted by the U.S. District Court for the Western District of Oklahoma. Misc. No. 22, Plan, United States District Court for the Western District of Oklahoma, (Approved, Feb. 27, 198)1. Both the Oklahoma plan and the fees currently available under the CJA are demonstrative of the pitiful attention and resources allocated to the defense function, a factor in the systemic impairment of counsel which must not be ignored by this Court.

The Oklahoma plan is so lacking in specificity as to leave virtual unbridled discretion for appointment of counsel in the hands of the trial judge. It permits the recruitment of the proverbial "warm body" for criminal representation in the federal court, much as defendant's trial counsel proved to be. Had the plan adopted: (1) controls for placement on and removal from the appointment panel, (2) independent screening of panel candidates by a neutral body, and (3) specific practice requirements or performance criteria, this case would never have arisen. Other jurisdictions have proposed or adopted plans that address each of these problems. See, e.g. Federal Judicial Council, CJA Committee, Model Plan for the Composition,

Administration, and Management of the Panel of Private Attorneys Under the Criminal Justice Act; No. 1426 Misc., Plan for the Appointment of Counsel and Other Services Pursuant to the Criminal Justice Act of 1964, As Amended (U.S. District Court for District of N.M., Approved, Oct. 19, 1980); District of Columbia Criminal Justice Act Plan, supra, at 43.

Moreover, payment of attorney's fees under the CJA was and is limited to $20.00 per hour for out-of-court work and $30.00 per hour for in-court, with a $1,000 maximum for felony representation, subject to fees in excess of the maximum on approval of the Chief Judge of the Circuit. 18 U.S.C. 3006A(d). Payment for expert witnesses and investigative

services is limited to a total of $300.00 under 18 U.S.C. 3006A(e)(3).

Limitation of fees in this fashion, particularly on the complex facts of this case, is unconscionable.[18] Those few who

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[18] This very same fee structure recently gave rise to a refusal by appointed lawyers in the District of Columbia to accept further cases without an increase in compensation. The attorneys asserted that the low fees resulted directly in their inability to deliver competent representation to the poor. "After 12 Years Without an Hourly Rate Rise, D.C.'s Court Appointed Lawyers Go on Strike," National Law Journal, Sept. 19, 1983.

While legislation is now pending which would amend the fee levels (H.R. 3233) critics have, for some time, asserted the inadequacy of CJA fees and their impact on quality. Cf. Bazelon, "The Realities of Gideon and Argersinger," 64 Geo. L. Rev. 811-838 (1976); Note, "Identifying and Remedying Ineffective Assistance of Criminal Defense Counsel: A New Look After United States v. Decoster," 93 Harv. L. Rev. 752, 776-780 (1980).

accept, willingly or unwillingly, the obligation to represent the indigent in vindication of the constitutional right for all citizens to counsel should not have to bear the disproportionate burden of cost in such cases. When the prosecution was here equipped to investigate and develop its case over a three year period, and with resources far beyond those of the already well-funded U.S. Attorney's office. This disparity goes far toward explaining defense counsel's ineffectiveness below. One of the principle benefits which would accrue from affirmance would predictably be the provision of resources necessary to make the Fifth, Sixth and Fourteenth Amendment guarantees more than a mere form of words.

CONCLUSION

The Tenth Circuit Court of Appeals correctly reversed the conviction of the defendant based on the cumulative errors which resulted in his denial of effective assistance of counsel. The decision of the Court of Appeals should be affirmed.

Respectfully Submitted,

Richard J. Wilson
Counsel of Record

Appendix A

REPORTED FEDERAL AND STATE APPELLATE DECISIONS REVERSING CONVICTIONS ON GROUNDS OF INEFFECTIVE ASSISTANCE OF COUNSEL.

January 1970 - July 1982

Federal Courts of Appeal*

Washington v. Maroney, 428 F.2d 10 (3d Cir. 1970) (late appointment and resulting trial errors)

Audry v. Henderson, 429 F.2d 26 (5th Cir. 1970) (counsel did not advise defendant of right to appeal)

Thomas v. Beto, 423 F.2d 642 (5th Cir. 1970) (failure to advise of right to appeal)

United States v. Hammonds, 425 F.2d 597 (D.C. Cir. 1970) (general ineffectiveness)

Matthews v. United States, 449 F.2d 985 (D.C. Cir. 1971) (casual summation) (reversed on other grounds)

Saltys v. Adams, 465 F.2d 1023 (2d Cir. 1972) (failure to file motion to suppress and ill-advised cross-examination)

Cooks v. United States, 461 F.2d 530 (5th Cir. 1972) (erroneously informing defendant that if he did not plead guilty he might be subject to a sentence six times greater than possible)

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* By year and by Circuit within years.

Gomez v. Beto, 462 F.2d 596 (5th Cir. 1972) (counsel did not investigate defendant's only defense)

Fitzgerald v. Beto, 479 F.2d 420 (5th Cir. 1973) (counsel failed to communicate dead offer from prosecutor to defendant)

Walker v. Caldwell, 476 F.2d 213 (5th Cir. 1973) (failure to assist defendant as to entry of guilty plea)

Herring v. Estelle, 491 F.2d 125 (5th Cir. 1974) (inadequate preparation when lawyer appointed on day of trial, resulting in ineffective advice)

Hudson v. Alabama, 493 F.2d 171 (5th Cir. 1974) (over defendant's protestations, counsel informed jury of deal and allowed conviction without any production of evidence)

United States v. Edwards, 488 F.2d 1154 (5th Cir. 1974) (failure to pursue a successful motion for a court-appointed psychiatrist)

McQueen v. Swenson, 498 F.2d 207 (8th Cir. 1974) (counsel failed to do any investigation other than to interview defendant)

Williams v. Twomey, 510 F.2d 634 (7th Cir. 1975) (failure to request delay to investigate)

Garza v. Wolff, 528 F.2d 208 (8th Cir. 1975) (counsel failed to call each expert witness and to investigate a police report)

United States v. Fessel, (5th Cir. 1976) (failure to move for a court-appointed psychiatrist)

Thomas v. Wright, 535 F.2d 407 (8th Cir. 1976) (counsel failed to interview any witnesses because of general policy against doing so, because of fear of bribery accusation)

United States v. Easter, 539 F.2d 663, (8th Cir. 1976) (failure to challenge search)

Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977) (ineffectiveness at vior dire and in challenging testimony)

United States ex.rel Healey v. Cannon, 553 F.2d 1052 (7th Cir. 1977) (counsel gave defendant "grossly deficient" advice concerning guilty plea)

United States v. Bosch, 584 F.2d 1113 (1st Cir. 1978) (trial counsel offered certain references to prior convictions into evidence)

Boyer v. Patton, 579 F.2d 284 (3rd Cir. 1978) (counsel failed to object to certain testimony)

Proffitt v. United States, 582 F.2d 854 (4th Cir. 1978) (counsel conditioned investigation and presentation of insanity defense on payment of lawyer's fee and expert witness expenses)

Bonds v. Wainwright, 564 F.2d 1125 (5th Cir. 1978) (ineffective in helping defendant decide whether to pursue direct appeal)

Canary v. Bland, 583 F.2d 887 (6th Cir. 1978) (inadvertent failure to challenge use of a prior conviction in a habitual criminal charge)

Davis v. Alabama, 596 F.2d 1214 (5th Cir. 1979) (failure to investigate insanity defense)

Brown v. Blackburn, 625 F.2d 35 (5th Cir. 1980) (failure to investigate)

United States v. Porterfield, 624 F.2d 122 (10th Cir. 1980) (failure to investigate)

Baty v. Balkcom, 661 F.2d 391 (5th Cir. 1981) (failure to investigate)

Wiley v. Sanders, 647 F.2d 642 (6th Cir. 1981) (in closing arguments, defense attorneys repeatedly referred to defendant as "guilty")

Ford v. Parratt, 638 F.2d 1115 (8th Cir. 1981) (failure to investigate a significant issue)

United States v. Baynes, 687 F.2d 659 (3d Cir. 1982) (failure to listen to exemplar of defendant's voice and compare it to government tape)

Uptain v. United States, 692 F.2d 8 (5th Cir. 1982) (counsel was at same time chief prosecution witness in defendant's bail-jumping trial)

Harris v. Housewright, 697 F.2d 202 (8th Cir. 1982) (general ineffectiveness)

Hollis v. United States, 687 F.2d 257 (8th Cir. 1982) (failure to file timely notice of appeal)

Goodwin v. Balkcom, 684 F.2d 794 (11th Cir. 1982) (lack of thorough investigation deprived defendant of a defense and counsel failed to perceive a credible challenge of the grand jury) (death penalty case)

United States v. Rumery, 698 F.2d 764 (5th Cir. 1983) (counsel erroneously advised defendant of maximum sentence causing defendant to enter guilty plea to avoid that false sentence)

Bishop v. Rose, 701 F.2d 1150 (6th Cir. 1983) (ineffectiveness caused by the State)

State High Courts and Courts of Appeal*

State v. Watson, 134 Ariz.L., 653 P.2d 351 (1982) (failure to request a hearing on identification procedures, considering evidence)

State v. Jackson, 534 P.2d 281 (Ariz. App. 1975) (late appointment)

Clark v. State, 274 Ark. 81, 621 S.W. 2d 857 (1981) (failure to file motion to dismiss for speedy trial violation)

Irons v. State, 267 Ark. 469, 591 S.W. 2d 650 (1980) (ineffectiveness involving guilty plea)

In re Saunders, 2 Cal. 3d 1033 (1970) (failure to undertake careful investigation deprived defendant of possible defense) (death penalty case)

In re Smith, 3 Cal. 3d 192 (1970) (failure of appellate counsel to raise crucial assignments of error)

In re Banks, 4 Cal. 3d 337 (1971) (failure to argue crucial issues on appeal)

People v. Shells, 4 Cal. 3d 626 (1971) (bad trial strategy based on poor investigation)

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* Alphabetically, by state, and by year within State.

People v. Rhoden, 6 Cal. 3d 519 (1972) (appellate counsel failed to raise crucial issues)

People v. Belcher, 11 Cal. 3d 91, (1974) (failure to advise defendant to enter proper plea)

In re Greenfield, 111 Cal. App. 3d 536 (1970) (failure to investigate easily discoverable case law)

In re Scruggs, 15 Cal. App. 3d 290 (1971) (incorrect plea entered on advice of counsel)

In re Kubler, 53 Cal. App. 3d 799 (1975) failure to enter proper plea, considering known evidence)

People v. Zimmerman, 102 Cal. App. 3d 647 (1980) (miscellaneous trial errors)

In re Cassandra R., 139 Cal. App. 3d 670 (1983) (counsel was totally unprepared at trial)

People v. Herrera, 188 Colo. 402, 534 P.2d 1199 (1975) (failure to research question)

People v. Moreland, 193 Colo. 237, 567 P.2d 355 (1977) (case proceeded to trial immediately following appointment of substitute counsel)

People v. Blalock, 197 Colo. 320, 592 P.2d 406 (1979) (introduction of damaging testimony)

People v. Gonzales, 37 Colo. App. 8, 543 P.2d 72 (1975) (general ineffectiveness)

Ashell v. United States, 436 A.2d 804 (D.C. 1981) (failure to conduct a full and prompt investigation)

Harris v. United States, 441 A.2d 268 (D.C. 1982) (failure to interview known witnesses or make minimal effort to discover available information)

Dixon v. State, 287 So.2d 698 (Fla. 1973) (defendant persuaded to plead guilty)

Martin v. State, 363 So.2d 403 (Fla. 1978) (failure to adequately prepare)

Castro v. State, 419 So.2d 796 (Fla. 1982) (failure to ascertain whether guilty plea was voluntary)

Holmes v. State, 429 So.2d 279 (Fla. 1983) (at sentencing hearing, ineffectiveness for failure to challenge aggravating circumstances) (death penalty case)

Cannon v. State, 136 Ga. App. 479 (1975) (different counsel only for arraignment)

People v. Brown, 52 Ill. 2d 227 (1972) (failure of appellate counsel to examine the record of petitioner's trial proceeding)

People v. Carter, 41 Ill. App. 3d 425 (1976) (ineffective tactics and argument)

People v. Lamparter, 56 Ill. App. 3d 823 (1977) (failure to demand new trial on valid issue)

People v. Meacham, 53 Ill. App. 3d 823 (1977) (failure to file timely motion to withdraw guilty plea)

People v. Adams, 71 Ill. App. 3d 138 (1979) (failure to do anything)

People v. Howard, 74 Ill. App. 3d 138 (1979) (failure to fully investigate past psychiatric history)

People v. Lemcke, 80 Ill. App. 3d 298 (1980) (failure to make offer of proof)

People v. Neeley, 90 Ill. App. 3d 76 (1980) (ineffective closing argument and failure to file motion to suppress)

People v. Nicewanner, 93 Ill. 3d 1 (1981) (failure to file timely motion to withdraw guilty plea)

People v. Kronkel, 113 Ill. App. 3d 992 (1983) (failure to investigate alibi witness)

Hartman v. State, 155 Ind. App. 199, 292 N.E. 2d 293 (1973) (counsel had virtually no time to prepare)

Jones v. State, 175 Ind. App. 343, 371 N.E. 2d 1314 (1978) (public defender given only 3 hours to consult with defendant, after retained counsel withdrew)

Blankenship v. Commonwealth, 554 S.W. 2d 898 (Ky. App. 1977) (failure to timely file appellate record)

State v. Myles, 389 So.2d 12 (La. 1980) (ineffectiveness at sentencing hearing at which no evidence was introduced) (death penalty case)

People v. Strodder, 394 Mich. 193 (1975) (general ineffectiveness and abusive treatment of court)

People v. Morris, 30 Mich. App. 169 (1971) (miscellaneous acts)

People v. Husband, 50 Mich. App. 46 (1973) (refusal by counsel to participate after not getting a continuance)

People v. Bryant, 77 Mich. App. 108 (1977) (failure to prepare an insanity defense which he had announced an intention to do)

People v. McDonnell, 91 Mich. App. 458 (1979) (failure by counsel to prepare an insanity defense of which he was aware)

People v. Snyder, 108 Mich. App. 754 (1981) (failure to obtain opinion on witness)

Hall v. State, 496 S.W. 2d 30 (Mo. 1973) (sole effort was plea bargain attempt)

Thomas v. State, 516 S.W. 2d 761 (Mo. 1974) (failure to investigate alibi)

State v. Moon, 602 S.W. 2d 828 (Mo. 1980) (failure to know plea entered)

Parcel v. State, 637 S.W. 2d 440 (Mo. 1982) (failure to ascertain from defendant whether there was a factual basis for his claimed relief)

Grondin v. State, 97 Nev. 454, 634 P.2d 456 (1981) (appellate counsel argued his petition was frivolous)

New Jersey v. Anderson, 117 N.J. Super. 507 (1971) (counsel was totally unprepared)

State v. Marrero, 155 N.J. Super. 567 (1978) (failure to make motion for pre-trial diversion of defendant)

New York v. Bennett, 29 N.Y. 2d 462 (1972) (complete lack of investigation or preparation)

People v. Labree, 34 N.Y. 2d 257 (1974) (general ineffectiveness)

New York v. Droz, 39 N.Y. 2d 457 (1976) (little or no effort to prepare)

New York v. Brown, 45 N.Y. 2d 852 (1978) (failure, among other things, to prepare)

New York v. Gonzalez, 47 N.Y. 2d 606 (1979) (filed appellate brief which made no arguments)

People v. Baldi, 76 App. Dec. 259 (N.Y. 1980) (general ineffectiveness)

State v. Sinatra, 89 App. Dec. 2d 913 (N.Y. 1982) (failre to raise question of defendant's competency to stand trial)

State v. Schelling, 92 App. Dec. 2d 694 (N.Y. 1983) (general ineffectiveness)

People v. Gonzalez, 43 App. Div. 2d 914 (N.Y., 1974) (failure to assist defendant at sentencing)

Carroll v. Cupp, 40 Or. App. 773, 621 P.2d 72 (1980) (ineffectiveness at sentencing)

Norton v. Cupp, 54 Or. App. 897, 636 P.2d 468 (1981) (failure of counsel to file a timely notice of appeal)

Shipley v. Cupp, 54 Or. App. 283, 650 P.2d 1032 (1982) (failure of appellate counsel to argue valid issue)

Commonwealth v. Wideman, 453 Pa. 119 (1973) (course chosen by counsel had no reasonable basis designed to effectuate defendant's interests)

Commonwealth v. Bronson, 457 Pa. 66 (1974) (failure to pursue alibi defense)

Commonwealth v. Adams, 465 Pa. 314 (1976) (failure to call corroborating witness)

Commonwealth v. Hillman, 465 Pa. 541 (1976) (failure of counsel to request time to investigate a questionable line-up identification)

Commonwealth v. Holmes, 468 Pa. 409 (1976) (failure to file a direct appeal on a valid issue)

Commonwealth v. Mabie, 467 Pa. 464 (1976) (failure to investigate defendant's contentions)

Commonwealth v. Ramos, 468 Pa. 404 (1976) (failure to explain charges or elements of crime)

Commonwealth v. Humphrey, 473 Pa. 533, 375 A.2d 717 (1977) (failure to object to references to defendant's exercising of right to remain silent)

Commonwealth v. Gaston, 474 Pa. 218, 378 A.2d 297 (1978) (failure to file motion to suppress)

Commonwealth v. Bailey, 480 Pa. 329, 390 A.2d 166 (1978) (failure to raise valid issue)

Commonwealth v. Smith, 478 Pa. 76, 385 A.2d 388 (1979) (appellate counsel ineffective for failing to raise valid issue)

Commonwealth v. Yocham, 483 Pa. 478, 397 A.2d 766 (1979) (failure to raise, on appeal, challenge to Commonwealth's showing at suppression hearing)

Commonwealth v. Hare, 486 Pa. 123, 404 A.2d 388 (1979) (appellate counsel ineffective for failing to raise valid issue)

Commonwealth v. von Smith, 486 Pa. 564, 406 A.2d 1034 (1979) (untimely request for severance)

Commonwealth v. Anderson, 490 Pa. 225, 415 A.2d 887 (1980) (failure to object to prosecutor's summation)

Commonwealth v. Brown, 496 Pa. 86, 436 A.2d 165 (1981) (counsel failed to object to prejudicial remarks)

Commonwealth v. Fassett, 496 Pa. 529, 437 A.2d 1166 (1981) (counsel failed to move for suppression of evidence)

Commonwealth v. Smith, 495 Pa. 362, 433 A.2d 1349 (1981) (failure to make a timely motion to sever the trial)

Commonwealth v. Boston, 242 Pa. Super. 98, 363 A.2d 1178 (1976) (failure to cross-examine main witness)

Commonwealth v. McCutchen, 245 Pa. Super. 56, 369 A.2d 291 (1976) (failure to appeal on valid issue)

Commonwealth v. Washington, 239 Pa. Super. 336 (1976) (failure to investigate and file notice of alibi)

Commonwealth v. Bable, 248 Pa. Super. 496, 375 A.2d 350 (1976) (failure to take direct appeal on valid issue)

Commonwealth v. Byrd, 250 Pa. Super. 250, 378 A.2d 921 (1977) (failure to file motion to dismiss on valid issue)

Commonwealth v. Griffith, 249 Pa. Super. 252, 376 A.2d 253 (1977) (failure to move to quash invalid indictments)

Commonwealth v. Gasper, 262 Pa. Super. 141, 396 A.2d 685 (1978) (decision to cross-examine on arguably illegal confession rather than moving to suppress)

Commonwealth v. McNeal, 261 Pa. Super. 332, 396 A.2d 424 (1978) (failure to preserve valid issue)

Commonwealth v. Davis, 267 Pa. Super. 118, 406 A.2d 547 (1979) (failure to ensure defendant understood charges)

Commonwealth v. Vasquez, 268 Pa. Super. 295, 408 A.2d 154 (1979) (failure to be aware of time requirements for filing a motion)

Commonwealth v. Allen, 278 Pa. Super. 501, 420 A.2d 653 (1980) (failure to ensure that defendant's guilty plea was voluntary)

Commonwealth v. Austin, 274 Pa. Super, 1, 417 A.2d 1220 (1980) (failure to object to charge)

Commonwealth v. Johnson, 280 Pa. Super. 309, 421 A.2d 737 (1980) (failure to file post-trial motion)

Commonwealth v. Wetzel, 276 Pa. Super. 445, 419 A.2d 541 (1980) (repeated reference to prior criminal activity)

Commonwealth v. Smith, 297 Pa. Super. 63, 443 A.2d 299 (1982) (failure to raise improper pre-trial waiver colloquy)

Commonwealth v. Stitzel, 454 A.2d 1072 (Pa. Super. 1982) (failure to challenge juror)

Commonwealth v. Tran, 453 A.2d 993 (Pa. Super. 1982) (failure to object to omitted charge)

Commonwealth v. White, 450 A.2d 63 (Pa. Super. 1982) (failure to find, interview, and call certain witnesses)

Commonwealth v. Williams, 297 Pa. Super. 138, 443 A.2d 338 (1982) (stipulation of crucial testimony)

Commonwealth v. Taliaferro, 455 A.2d 694 (Pa. Super. 1983) (failure to object to prejudicial irrelevant evidence)

State v. McBride, 296 N.W. 2d 551 (S.D. 1980) (miscellaneous)

Grooms v. State, 320 N.W. 2d 149 (S.D. 1982) (failure to make timely appeal)

McKeldin v. State, 516 S.W. 2d 82 (Tenn. 1974) (defendant was represented by someone masquerading as a lawyer)

Prince v. State, 500 S.W. 2d 533 (Texas 1973) (counsel appointed on day of trial)

Ex parte Cavett, 521 S.W. 2d 619 (Texas 1975) (alibi witnesses not subpoenaed)

Flores v. State, 576 S.W. 2d 632 (Texas 1978) (failure to investigate)

Cude v. State, 588 S.W. 2d 895 (Texas 1979) (failure to object to numerous prejudicial matters)

Miles v. State, 644 S.W. 2d 23 (Texas 1982) (general ineffectiveness)

Weathersby v. State, 627 S.W. 2d 729 (Texas 1982) (failure to object to inadmissible testimony)

Brewer v. State, 649 S.W. 2d 628 (Texas 1983) (improper statements by counsel as to tape recording of pre-trial consultation)

State v. Ernest, 94 Wash. 2d 839, 621 P.2d 121 (1980) (failure to interview witnesses)

State v. Jury, 19 Wash. App. 256, 576 P.2d 1302 (1978) (failure to conduct adequate investigation)

State v. Thomas, 157 W.Va. 640, 203 S.E. 2d 445 (1974) (miscellaneous trial errors)

Cannellas v. McKenzie, 236 S.E. 2d 327 (W.Va. 1977) (miscellaneous trial errors)

State v. Pelfry, 256 S.E. 2d 438 (W.Va. 1979) (failure to move for a mistrial solely for economic reasons)

State v. Bias, 301 S.E. 2d 776 (W.Va. 1983) (failure to utilize overwhelming evidence of defendant's insanity) (death penalty case)

State v. Felton, 110 Wis. 2d 485, 329 N.W. 2d 161 (1983) (failure to learn relevant law and failure to investigate)

No. 82-660-CFY Title: United States, Petitioner
Status: GRANTED v.
Harrison P. Cronic

Docketed: Court: United States Court of Appeals
October 14, 1982 for the Tenth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Duke, Steven D.

Entry	Date	Note	Proceedings and Orders
1	Sep 3 1982		Application for extension of time to file petition and order granting same until October 14, 1982 (White, September 9, 1982).
2	Jan 18 1983	G	Petition for writ of certiorari filed.
4	Oct 25 1982		Order extending time to file response to petition until November 29, 1982.
5	Nov 26 1982	G	Motion of respondent for leave to proceed in forma pauperis filed.
6	Nov 26 1982		Brief of respondent in opposition filed.
7	Dec 1 1982		DISTRIBUTED. January 7, 1983
8	Dec 2 1982	N	Motion of respondent pro se for leave to proceed in forma pauperis filed.
9	Dec 2 1982	X	Brief of respondent pro se in opposition filed.
10	Jan 7 1983		Record requested.
11	Jan 18 1983		Record filed.
12	Feb 14 1983		REDISTRIBUTED. February 18, 1983
13	Feb 15 1983	X	Reply brief of petitioner filed.
14	Feb 22 1983		Motion of respondent for leave to proceed in forma pauperis GRANTED.
15	Feb 22 1983		Petition GRANTED.
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16	Mar 9 1983	D	Motion of respondent to discharge counsel appointed by lower court and for leave to proceed pro se filed.
17	Mar 9 1983	G	Motion of respondent for appointment of counsel filed.
18	Mar 11 1983		DISTRIBUTED. March 18, 1983 (Above motions)
19	Mar 21 1983		Motion of DENIED.
20	Mar 21 1983		Motion for appointment of counsel GRANTED and it is ordered that David W. Duncan, Esquire, of Durango, Colorado, is appointed to serve as counsel for the respondent in this case.
22	Apr 8 1983		Order extending time to file response to petition until May 9, 1983.
23	May 10 1983		Order further extending time to file response to petition until June 9, 1983.
24	Jun 2 1983	G	Motion of respondent for substitution of counsel filed.
25	Jun 3 1983		DISTRIBUTED. June 9, 1983. (Motion of respondent for substitution of counsel).
26	May 27 1983		PROCEEDING ON DEFERRED APPENDIX
27	Jun 9 1983		Order further extending time to file response to petition until June 24, 1983.
28	Jun 13 1983		DISTRIBUTED. June 16, 1983. (Motion of respondent for substit. of counsel).

No. 82-562-CFX

Entry	Date	Note	Proceedings and Orders
29	Jun 22 1983		Motion of respondent for substitution of counsel GRANTED, and it is ordered that Steven B. Duke, Esquire, of New Haven, Connecticut, is appointed to serve as counsel for the respondent in this case in place of David M. Duncan, Esquire, of Durango, Colorado, who is hereby discharged.
30	Jun 27 1983		Order further extending time to file petitioner's brief on merits for 10 days after Court's decision in 81-1794.
31	Jul 5 1983		Order further extending time to file response to petition until July 15, 1983.
32	Jul 15 1983		brief of petitioner filed.
34	Aug 18 1983		Order extending time to file response to petition until September 19, 1983.
35	Sep 15 1983		Order further extending time to file response to petition until October 19, 1983.
36	Oct 20 1983		Order further extending time to file response to petition until November 9, 1983.
37	Nov 9 1983		brief of respondent Harrison P. Cronic filed.
38	Nov 9 1983		brief amicus curiae of National Association of Criminal Defense Lawyers, et al. filed.
39	Nov 9 1983		brief amicus curiae of National Legal Aid and Defender Association, et al. filed.
40	Nov 23 1983		SET FOR ARGUMENT, Tuesday, January 10, 1984. (1st case)
41	Jul 15 1983		joint appendix filed.
42	Dec 1 1983		Application for leave to exceed the page limit on respondent's brief on the merits filed with Sup. Ct. (A-421).
43	Dec 1 1983		Order granting same not to exceed 60 pages, by white, J., 12/1/83.
44	Dec 8 1983		CANCELLATED.
45	Dec 9 1983		brief of respondent Harrison P. Cronic filed.
46	Dec 23 1983	X	reply brief of petitioner United States filed.
47	Jan 10 1984		ARGUED.